

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





74-2047

B  
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants.  
-----x

:

:

:

:

:

Docket Nos.

74-2047

74-2127

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

PAUL G. CHEVIGNY  
EVE CARY  
New York Civil Liberties Union  
84 Fifth Avenue  
New York, New York 10011

NATHAN LEWIN  
Miller, Cassidy, Larroca  
& Lewin  
1320 19th Street, N.W.  
Washington, D. C. 20036



ONLY COPY AVAILABLE 4

PAGINATION AS IN ORIGINAL COPY

## TABLE OF CONTENTS

Docket Entries, United States District Court, 73 Cr. Misc. 24.....	1
Docket Entries, United States District Court, 73 Cr. Misc. 25.....	3
Order to Show Cause, 73 Cr. Misc. 24.....	5
Exhibit "A" to Order to Show Cause.....	10
Exhibit "B" to Order to Show Cause.....	33
Order to Show Cause, 73 Cr. Misc. 25.....	43
Exhibit "A" to Order to Show Cause.....	48
Exhibit "B" to Order to Show Cause.....	81
Defendants' Notice of Motion for Disclosure and to Dismiss.....	96
Defendants' Notice of Motion for Disclosure.....	101
Opinion of Griesa, J.....	158
Minutes of Trial.....	172
Government's Trial Exhibit 1.....	325
Government's Trial Exhibit 1B.....	326
Government's Trial Exhibit 1C.....	327
Government's Trial Exhibit 1D.....	329
Government's Trial Exhibit 2A.....	335
Government's Trial Exhibit 2B.....	336
Government's Trial Exhibit 2C.....	345
Government's Trial Exhibit 3.....	348
Government's Trial Exhibit 4A.....	359

Government's Trial Exhibit 4B.....	360
Judgment.....	363
Notice of Appeal, 73 Cr. Misc. 24.....	365
Notice of Appeal, 73 Cr. Misc. 25.....	366

DOCKET ENTRIES

A. United States of America v. Jeffrey Smilow  
73 Crim. Misc. 24

CRIMINAL DOCKET 73 CRIM. MISC. 24

CRIMINAL COURT PT (Re: 72 CR 776)

DATE	JUDGE GRIESA	PROCEEDINGS	13:01; Rule 12(1) P.R.Cr. Proc.
			for Court.: Henry Putzel, III, L.S.A.
			Ex 6321
	UNITED STATES OF AMERICA		
	vs.		
	RICHARD WOOD		
6-29-73		Filed affidavit and order to show cause in re Criminal contempt. - not. 7-2-73	
		10:30 A.M. in Court 110	
7-3-73		Filed notice of appearance by Arthur Miller, Esq., 1808 Avenue R, Brooklyn, NY	
		(Phone: 646-1105)	
7-3-73		Def. pleads not guilty. (Bail limits extended to include all of N.Y. State)	
		to allow for motions - Case assigned to Judge Griesa (also see 73 Cr. Misc. 24)	
8-8-73		Filed consent to change Atty, Paul Chevigny Esq., 84 5th Ave as	
		new atty.	
9-26-73		Filed affirmation and order consented, that the defts bail limits are extended	
		to include the D.C.N.Y. and the Dist. of New Jersey. Griesa, J.	
11-2-73		Filed affidavit and notice of motion for disclosure and to dismiss.	
		Filed memorandum of law in support of motion.	
		Filed notice of motion for disclosure.	
		Filed memorandum in support of motion. (See 73 Cr. Misc. 24)	

ONLY COPY AVAILABLE

Docket Entries, U.S.A. v. Jeffrey Smilow, con't.

- 5-6-74 Filed Govt's memo. in opposition to defts' pre-trial motions.  
Filed memo. of law for deffts.'.  
Filed Opinion by Griesa, J.-Opinion #40672-Defendants motions denied.  
(See opinion in room 504)
- 7-17-74 Defendant guilty as charged. Sentence date Sept. 11, 1 P.M., Wednesday, Room 1505.  
Pre-sentence report ordered.
- 7-18-74 RICHARD HUSS - Re-application for bail granted. Deft. released on \$60,000 bail, \$30,000 secured by parents' home and \$10,000 PRB signed by father. Sentence date July 31, 1 P.M. Pre-sentence report ordered. Deft. released immediately and bail to be met by 1 P.M. July 19, 1974.
- 7-19-74 RICHARD HUSS - Filed PRB in the sum of \$10,000 acknowledged by cashier.
- 7-31-74 Filed Judgment and Order:\*\*\*\*\*It is hereby ORDERED AND ADJUDGED that Richard Huss and Jeffrey Smilow be, and hereby are, remanded to the custody of the Attorney General or his duly authorized representative for a period of One(1) Year, service of the said sentence to commence August 5, 1974 at 10:00 a.m. at which time the said defendants shall surrender themselves at Room 506, United States Courthouse, Foley Square New York, N.Y. It is so ordered. Griesa, J.  
(Certified copies to U.S. Marshal)
- 8-1-74 Filed Order. It is hereby adjudged and decreed that during the sentences of the defts. purs. to their convictions in the above-entitled action, the deffs. shall be allowed food in accordance with Jewish dietary laws  
Griesa, J. (m/n)
- 8-1-74 Filed Memorandum Decision #41051\*\*\*\*\* Deft. has moved for release on bail pending appeal. The application is denied. So Ordered.
- 8-2-74 Filed notice of appeal to U.S.C.A. for the 2nd. Circuit from Judgment of U.S.D.C. for the S.D.N.Y. of criminal contempt entered 7-31-74.  
(Notices mailed to Govt., deft's atty. & deft)

B. United States of America v. Richard Huss  
73 Crim. Misc. 25

CRIMINAL DOCKET

73 CRIM MISC. 25

CRIMINAL CONTEMPT (Re 72 CR 778)

DATE	JUDGE GRIESA	PROCEEDINGS	18:40L; Rule 12(L) F.R.Cr. Proc.
			For Govt.: Henry Patzel, III, AUSA Ch. 6331
	UNITED STATES OF AMERICA		
	vs.		
	JEFFREY H. SMILON		
	-----		
<del>6-29-73</del> (6-29-73)	Filed affidavit and Order to show cause in re Criminal contempt. - ret. on 7-3-73		
	at 10:30 A.M. in Room 110		
<del>7-3-73</del> (7-3-73)	Filed notice of appearance by Robert P. Leighton, Esq., 15 Park Row, NYC (267-4016)		
<del>7-3-73</del> (7-3-73)	Def. pleads not guilty (trial continued) 10 days for motions - case assigned to Judge Griesa. (also see 73 CR Misc. 25)	--	Knaap, J.
<del>7-23-73</del> (7-23-73)	MATHEW LEVI MARTIN. Filed Commitment & entered return, Def. Delivered to the Detention House NYC		
<del>8-8-73</del> (8-8-73)	Filed consent to change Atty, Paul Chevigny 84 5th Ave.		
11-2-73	Filed affidavit and notice of motion for disclosure and to dismiss. Filed memorandum of law in support of motion. Filed notice of motion for disclosure. Filed memorandum in support of motion. (See 73 Crim Misc. 25)		

ONLY COPY AVAILABLE



Docket Entries, U.S.A. v. Richard Huss, con't.

- 5-6-74 Filed Govt's memo. in opposition to defts's pre-trial motions.  
Filed reply memo. of law for defts's.  
Filed Opinion by Griesa, J.-Opinion #40672-Defendants motions denied.  
(See opinion in room 504)
- 7-17-74 Defendant guilty as charged. Sentence date Sept. 11, 1 P.M. Wednesday, Room 1905.  
Pre-sentence report ordered.
- 7-19-74 Re-application for bail granted. Deft. released on \$60,000 bail, \$50,000  
secured by parent's home and 10,000 PRB signed by father. Sentence date July 31,  
1 P.M. Pre-sentence report ordered. Deft. released immediately and bail  
to be set by 1 P.M. July 19, 1974.
- 7-22-74 JEFFREY H. SMILOW - Filed PRB in the sum of \$10,000.00 acknowledged by cashier.
- 7-31-74 Filed Judgment and Order:\*\*\*\*\* It is hereby ORDERED AND ADJUDGED  
that Richard Huss and Jeffrey Smilow be, and hereby are, remanded to the  
custody of the Attorney General or his duly authorized representative for  
a period of One(1) Year, service of the said sentence to commence Aug.  
5, 1974 at 10:00 a.m. at which time the said defendants shall surrender  
themselves at Room 506, United States Courthouse, Foley Square, New York  
N.Y. It is so ordered. Griesa, J.  
(Certified copies to U.S. Marshal)
- 8-1-74 Filed Order: It is hereby adjudged and decreed that during the sentences  
of the defts. purs. to their convictions in the above-entitled action,  
the Defts. shall be allowed food in accordance with Jewish dietary laws.  
Griesa, J. (m/n)
- 8-1-74 Filed Noncommittal Decision #41050 \*\*\*\*\*Deft. has moved for release on  
bail pending appeal. The application is denied. So ordered. Griesa, J. (m/n)
- 8-1-74 Filed notice of appeal to U.S.C.A., for the 2nd Circuit from judgment of  
U.S.D.C., for the S.D.N.Y. of criminal contempt entered 7-31-74.  
(Notices mailed to Govt., deft's attys. & defts.)

ONLY COPY AVAILABLE

5

ORDER TO SHOW CAUSE AND EXHIBITS

73 CR 778 A.B.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

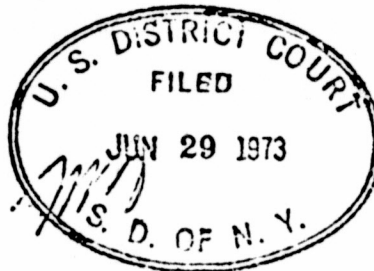
----- X  
UNITED STATES OF AMERICA

-v-

JEFFREY H. SMILOW,

Defendant.

Re: 72 CR. 778 A.B.  
ORDER TO SHOW CAUSE



Sufficient cause appearing therefor, it is hereby  
ORDERED pursuant to Rule 42(b), Federal Rules of  
Criminal Procedure that Jeffrey H. Smilow show cause  
before this Court on July 3, 1973 at 10:30 a.m. in Room  
110 of the United States Courthouse, Foley Square, New York,  
New York, why he should not be adjudged in criminal contempt  
of Court for his wilful refusal to answer questions put to  
him at the trial of United States v. Stuart Cohen and  
Sheldon Davis, 72 Cr. 778, as more fully set forth in the  
accompanying affidavit.

IT IS FURTHER ORDERED that service of this order  
to show cause on Jeffrey H. Smilow on or before 5:00 p.m.,  
June 28, 1973, be deemed good and sufficient service.

IT IS FURTHER ORDERED that, for the reasons stated  
by me in open Court, Jeffrey H. Smilow be arrested by the

United States Marshal, and

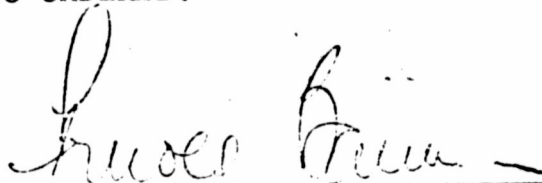
IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, bail shall be fixed in the amount of \$50,000 cash or surety bond, and the defendant shall be remanded to the custody of the Attorney General or his duly authorized representative if he is unable to post such bail.

IT IS FURTHER ORDERED that the United States Attorney for the Southern District of New York or any Assistant United States Attorney be and they hereby are appointed and directed to prosecute said Jeffrey H. Smilow on behalf of this Court.

Dated: New York, New York

June 28, 1973

SO ORDERED:



ARNOLD BAUMAN  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

-v- :

JEFFREY H. SMILOW, :

Defendant. :

AFFIDAVIT

----- x

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

HENRY PUTZEL, III, being duly sworn, deposes  
and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and, as such, was in charge of the prosecution of the case of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778. I make this affidavit in support of the Government's application for the issuance of an order directing Jeffrey H. Smilow to show cause why he should not be held in criminal contempt for wilfully refusing to obey the Court's lawful order to answer questions put to him during the criminal trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778,

2. On May 30, 1973, a jury was duly empaneled in this District to hear the criminal case of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778. On June 8,

1973 JEFFREY H. SMILOW was called to testify as a witness in said case and was duly placed under affirmation.

3. On June 8, 1973, after Smilow had asserted his privilege against self-incrimination the Court conferred immunity upon him pursuant to Title 18, United States Code, Sections 6002 et seq. Thereafter, the said JEFFREY H. SMILOW did wilfully and without just cause refuse to obey the Court's lawful order to answer the questions put to him by counsel for the Government. The Court thereupon adjudged Smilow in civil contempt of Court pursuant to Title 28, United States Code, Section 1826 and ordered that he be imprisoned until he should purge himself of his contempt by answering the questions as ordered by the Court or until the conclusion of said trial. The Court also explicitly advised Smilow at that time that, should he persist in his wilful refusal to obey the Court's lawful order, he would be subject to punishment for criminal contempt.

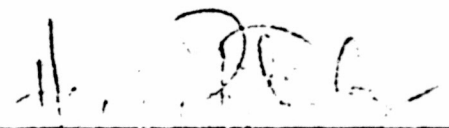
4. On June 26, 1973 the United States Court of Appeals for the Second Circuit affirmed the judgment of civil contempt. On June 27, 1973, JEFFREY H. SMILOW was again placed under affirmation in the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778 and thereupon repeated his refusal to answer the questions previously

put to him. The Government thereupon stated that it was unable to proceed with the prosecution of the charges at bar, and the trial was thereupon terminated.

5. I attach herewith and incorporate as a part of this affidavit the transcripts of proceedings of June 8, 1973 (Exhibit A) and of June 27, 1973 (Exhibit B).

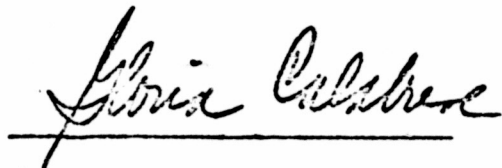
6. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that the order to show cause be issued.



HENRY PUTZEL, III  
Assistant United States Attorney

Sworn to before me this  
28<sup>th</sup> day of June, 1973



GLORIA CALABRESE  
Notary Public, State of New York  
No. 24-0535340  
Qualified in Kings County  
Commission Expires March 30, 1975

EXHIBIT "A" TO ORDER TO SHOW CAUSE

21 J E F F R E Y S M I L O W, called as a witness by  
22 the Government, being affirmed, testified as follows:

23 MR. ROBERT LEIGHTON: Your Honor, at this time  
24 I respectfully ask the Court to direct the United States  
25 Attorney not to call Mr. Smilow as a witness and ask the  
2 Government whether or not under Section 3504A-1, they have  
3 any illegal wiretaps or any wiretaps or any electronic  
4 surveillance wherein the voice of Mr. Smilow has been recorded  
5 and/or overheard.

6 MR. JAFFE: Your Honor, the Government has read  
7 into the record the telegram with regard to the electronic  
8 surveillance. We have also furnished to counsel copies of  
9 logs which contain the name Jeff. The Government does  
10 not have knowledge of whether that is Jeffrey Smilow or some  
11 other Jeff but those logs have been furnished to Mr. Smilow's  
12 counsel.

13 THE COURT: Yes.

14 MR. JAFFE: With regard to a statement that other  
15 than those logs furnished, there are no electronic surveillance  
16 of this individual.

17 We have an affidavit which is going to be filed  
18 with the Court as soon as we get it from the Department of

ONLY COPY AVAILABLE



19 Justice and we are told that the affidavit will state that  
20 other than the overhearings of the name Jeff, there are no  
21 electronic surveillances of this witness Jeffrey Smilow and  
22 that includes the affidavit Court Exhibit 3 with regard  
23 to the CIA.

24 THE COURT: Yes.

25 MR. LEIGHTON: Your Honor, may I state that the  
2 Government did hand to me today a copy of logs which I pre-  
3 sume is the sum and substance of the wiretaps concerning a  
4 Jeff and the possibility of a Mr. Smilow.

5 THE COURT: I so understand.

6 MR. LEIGHTON: We have not had the opportunity to  
7 listen to these tapes or to see a transcript if such tran-  
8 script was ever compiled. I understand no such transcript  
9 was every compiled.

10 MR. JAMES: Our information, your Honor, is that,  
11 and this is from testimony that your Honor heard, there are  
12 no tapes, there are no transcripts, there are only these  
13 logs.

14 MR. LEIGHTON: Your Honor, we still have not had  
15 an opportunity to listen to these tapes. The logs are a  
16 mere summary.

17 THE COURT: He just said they don't exist any  
18 more.

ONLY COPY AVAILABLE



19 MR. LEIGHTON: The tapes do not exist.

20 MR. JAFFE: That's correct.

21 MR. LEIGHTON: Your Honor, on this basis alone  
22 I would ask your Honor to direct the Government to refrain  
23 from calling Mr. Smilew as a witness.

24 THE COURT: I have not seen these logs. Let me  
25 see them, please.

2 MR. JAFFE: I will hand up to the Court--mark this  
3 Court Exhibit 4, if the Court please?

4 (Court Exhibit 4 marked in evidence.)

5 THE COURT: Just on that one page that you have  
6 marked Exhibit 4?

7 MR. JAFFE: The second page. It is a carrying  
8 page, your Honor.

9 THE COURT: Just these two pages?

10 MR. JAFFE: That's correct, your Honor.

11 MR. LEIGHTON: Your Honor, may I further call to  
12 the Court's attention, I am sure that the court is aware of  
13 Section 2518 of Title 18, subdivision 8A, where it clearly  
14 states that recordings, tapes, shall not be destroyed and  
15 they should be kept available for a period of ten years.

16 I think this argument was raised at an earlier  
17 point with one of the other witnesses.

18 MR. JAFFE: Your Honor, that is the warehousing

19 issue that was raised before the Court and that particular  
20 section is directed to Court Ordered wiretaps.

21 It is not appropriate for national security wire-  
22 taps. The Government has raised that issue with the Court  
23 and that issue is raised by Seigel-on appeal.

24 THE COURT: Denied.

25 MR. LEIGHTON: Your Honor, I would also ask your  
2 Honor for a similar order on the basis that the Government  
3 has further electronic surveillance of this defendant with  
4 Sheldon Seigel.

5 THE COURT: I don't understand you Mr. Leighton.

6 MR. LEIGHTON: The Government has stated that there  
7 is no other electronic surveillance of this witness.

8 THE COURT: Right.

9 MR. LEIGHTON: It's come to my attention that  
10 the Government is in possession of further and other sur-  
11 veillance of this witness, Mr. Smilow; that is, namely  
12 taped conversations.

13 THE COURT: Electronic?

14 MR. LEIGHTON: Taped conversations.

15 THE COURT: All right.

16 MR. LEIGHTON: With Mr. Seigel?

17 MR. JAFFE: We have consensual conversations between  
18 Mr. Smilow and Mr. Seigel. Those we do have, your Honor,

19 and those were taken by Mr. Seigel wearing a wire recorder  
20 on his body; he having consented to engage in conversations  
21 with Mr. Smilow at that time. I am informed that transcripts  
22 of those conversations have been turned over to Mr. Leighton.

23 MR. LEIGHTON: Your Honor; I haven't had an oppor-  
24 tunity to read these conversations. The basis for my argu-  
25 ment is that based on merely the decision, we have a decision  
2 where there is an alleged Government informer who is par-  
3 taking in defense strategy, sort of an enemy in the defense  
4 camp and the Government, using this informant, obtained  
5 information which I feel is going to be the basis of certain  
6 questions placed to Mr. Smilow in this proceeding.

7 Therefore, it is tainted and illegal.

8 THE COURT: I think I have ruled on that substan-  
9 tially already; have I not?

10 MR. JAFFE: Your Honor, those taped conversations  
11 are conversations that were taped before a complaint was  
12 filed in this case.

13 MR. LEIGHTON: Judge, I was never a part of any  
14 proceeding which took place previously or prior to last  
15 week. Mr. Smilow was never called to any of the other pro-  
16 ceedings.

17 THE COURT: But his point is the well-known one  
18 that where one party to a conversation consents and records,

## ONLY COPY AVAILABLE

19 that is not an illegal act; and there doesn't seem to be  
20 much question about that principle at all.

21 MR. LEIGHTON: My argument your Honor, is that  
22 Mr. Seigel was a Government informant, a Government agent  
23 at that time.

24 THE COURT: Sure. I don't think you will get  
25 any disagreement about that.

2 MR. JAFFE: Absolutely not, Judge.

3 THE COURT: They are the people who wired him  
4 presumably, although has shown himself to be pretty good  
5 at the thing himself.

6 MR. LEIGHTON: It is a similar situation as in the  
7 Rosner matter which was tried before your Honor, and that  
8 question was raised.

9 Mr. Smilow is a defendant presently in the State  
10 Court under charges which are mentioned in this indictment.  
11 Mr. Smilow conferred with defendants in this case and Mr.  
12 Seigel as a Government agent and informant conferred while  
13 he was a Government agent, obtaining information which he  
14 should not have obtained.

15 MR. JAFFE: Your Honor, I think he totally misses  
16 the point. The point is that Seigel was a Government infor-  
17 mant who, prior to the filing of any indictments either in  
18 the State Court or in this Court concerning these bombings,  
19 engaged in conversations as a Government informant and made

20 certain wire recordings of the voices; and there is absolutely  
21 no law that says the Government is not entitled to use a  
22 consenting informant to do that.

23 THE COURT: Yes, your application is denied. That  
24 is the law beyond question, Mr. Leighton.

25 MR. LEIGHTON: There is one further application,  
2 your Honor, to direct a similar order and that is that this  
3 defendant has already once been held in jeopardy on the  
4 same issue although it was before a grand jury and not a  
5 court proceeding.

6 He has already been held in contempt, he has  
7 already been punished, and that case was eventually dismissed  
8 although this defendant did spend some two weeks incarcerated.

9 THE COURT: That has nothing to do with this par-  
10 ticular law suit.

11 Denied.

12 DIRECT EXAMINATION

13 BY MR. JAFFE:

14 Q Mr. Smilow, would you tell us your age, sir?

15 A 18.

16 Q I don't hear you.

17 A 18.

18 THE COURT: He said 18.

19 MR. JAFFE: May I have a moment to get a file,  
20 Judge?

21 THE COURT: Yes.

22 MR. SLOTHICK: While Mr. Jaffe is getting the file,  
23 in order to expedite matters, I would renew my objection  
24 based upon the fact I think the same procedure will accompany  
25 Mr. Smilow's testimony if any and for the purpose of the  
2 recording by reference everything I have said before with  
3 regard to the other witnesses.

4 THE COURT: Yes. The same ruling.

5 BY MR. JAFFE:

6 Q Mr. Smilow, directing your attention to January  
7 26, 1972, did you on that day during the morning, see  
8 Sheldon Davis or Stuart Cohen?

9 A I refuse to answer on the ground that to require  
10 me to respond to the question would violate my Constitutional  
11 right of freedom of worship as a committed and observant  
12 Jew under the First Amendment to the United States Consti-  
13 tution and that to compel me to answer said question would  
14 violate my right of freedom of worship as a committed and  
15 observant Jew in that under traditional Jewish Law I didn't  
16 testify in any case where I am to receive an advantage or  
17 benefit because of my testimony against individuals.

18 I refuse to answer the question on the ground that  
19 I presently am charged with committing on January 26, 1972 at  
20 about 9:25 a.m., at 165 West 57th Street, New York, a crime  
21 of arson.

22 I refuse to answer on the ground that to require  
23 me to respond to the question would violate my right to  
24 remain silent which is guaranteed under the First Amendment  
25 of the United States Constitution.

2 I respectfully refuse to testify against myself.  
3 I further refuse to testify on the basis that the Government  
4 obtained information illegally by allowing a co-defendant  
5 to act as an informant and to participate in taped conver-  
6 sations with me.

7 I further respectfully refuse to answer on the  
8 basis that I have already been put in jeopardy for the same  
9 proceeding and I have been already punished although that  
10 proceeding was dismissed.

11 MR. JAMES: With regard to the witness' refusal to  
12 answer on the basis that he refuses to testify against  
13 himself, the Government at this time makes application to  
14 grant immunity to the witness. We hand up to the Court the  
15 original application and copies of the original letters and  
16 we hand a copy of the immunity application to his attorney.

17 MR. SLOTHICK: May defense counsel have a copy of

18 that, your Honor.

19 MR. JAFFE: I will hand a copy to defense counsel,  
20 so they both may take a look at that, your Honor.

21 MR. SLOTNICK: Thank you, Mr. Jaffe.

22 THE COURT: There is a blank in the date of filing  
23 in the order.

24 MR. JAFFE: That was originally filed on the 31st,  
25 your Honor.

2 THE COURT: On May 31st?

3 MR. JAFFE: That's correct.

4 THE COURT: Mr. Smilow, I have just signed an  
5 order that confers upon you immunity against the use of  
6 anything that you are required to testify to in this courtroom.  
7 Do you understand that?

8 THE WITNESS: I understand.

9 THE COURT: DO you want a reasonable time to talk  
10 to your lawyer about the significance of the order I have  
11 just signed?

12 A No.

13 THE COURT: The witness says no. Go ahead.

14 MR. SLOTNICK: Your Honor, for the record, my  
15 silence should not be an indication of approval other than  
16 just I am constrained to act under your Honor's prior  
17 ruling.

ONLY COPY AVAILABLE



18 THE COURT: I understand, yes. You have a con-  
19 tinuing objection to these entire proceedings, both of  
20 you?

21 MR. JAFFE: Your Honor, with regard to the other  
22 basis raised by the witness with regard to his religious  
23 objection, the religious objection is almost in haec verba  
24 the statement he made before the grand jury, which was  
25 subsequently made before Judge Weinfeld and determined to  
2 be insufficient, affirmed by the Second Circuit in the First  
3 Smilow case by Judge Feinberg; and we would ask the Court  
4 to instruct the witness with regard to his religious bases  
5 that in fact he has no religious basis on which he may decline  
6 to answer questions under the First Amendment.

7 THE COURT: Yes. You understand that so far as  
8 your assertion of a privilege, whether it be constitutionally  
9 based or religiously based, I do not find that that is an  
10 appropriate reason for refusing to answer proper questions,  
11 and I should direct you to answer such questions as I  
12 deem proper.

13 MR. JAFFE: With regard to the refusal to answer  
14 based upon his indictment or his plea to arson in the  
15 New York State Court, we would ask that this exhibit be  
16 marked Exhibit 5, Court Exhibit 5 for the Court to take

17 judicial notice of the fact that the witness has on November  
18 27, 1972 entered a plea of guilty to an E Felony for the  
19 arson he was charged with, and that his refusal to testify  
20 based on any type of Fifth Amendment ground is covered by the  
21 immunity that the Court has just conferred upon him.

22 (Court Exhibit 5 marked.)

23 THE COURT: I think the record should indicate  
24 that I addressed to the witness a statement that immunity  
25 has been pursuant to the authority set forth in Title 18  
2 U. S. Code, Section 6003.

3 MR. JAFFE: With regard to his other basis for  
4 refusing to testify--

5 THE COURT: Just a moment. 6002 is the order  
6 that I made. In any event you understand that now immunity  
7 has been conferred upon you, do you not?

8 A Yes.

9 MR. JAFFE: With regard to his other basis, your  
10 Honor, the witness refuses to answer based on two assertions,  
11 one that he has been placed in double jeopardy in that he was  
12 on a previous occasion held in contempt for refusing to  
13 testify. We ask the Court to instrut him that that is an  
14 insufficient basis for refusing to now testify before a  
15 hearing held in front of the Court.

16 THE COURT: I so instruct the witness.

17 MR. JAFFE: With regard to his refusal to answer  
18 based on the discovery of this witness by the existence of  
19 tapes which led to the discovery of the witness Sheldon  
20 Seigel, we would ask the Court to instruct him that that too  
21 is no basis on which he may refuse to testify.

22 THE COURT: Yes, the witness is so instructed.

23 BY MR. JAFFE:

24 Q Mr. Smilow, directing your attention to January 26,  
25 1972, did you on that date meet with Sheldon Davis, and with  
2 Murray Elbogen, Jerome Cellerkraut, and Richard Huss?

3 THE COURT: You need not read the entire thing,  
4 Mr. Smilow. You may say "same declination" if that is what  
5 you want to do.

6 A Same declination?

7 MR. PUTNELL: I didn't hear the answer.

8 THE COURT: He said "same declination".

9 MR. JAFFE: Would the Court direct the witness  
10 to answer that question.

11 THE COURT: I order you to answer that question.

12 THE WITNESS: Same declination.

13 Q Mr. Smilow, who did you prior to January 26, 1972  
14 have any conversations with Stuart Cohen or Sheldon Davis  
15 concerning your agreement with them to take an attache

ONLY COPY AVAILABLE

16 case to the premises of Columbia Artists Management, Inc.  
17 to there ignite a fuse contained in that attache case and  
18 in fact on the 26th?

19 THE COURT: Mr. Jaffe, don't tell a story. Just  
20 read a lawyer-like question, please.

21 MR. JAFFE: Let me withdraw the question.

22 Q Prior to January 26, 1972, did you have a conver-  
23 sation or conversations with Sheldon Davis and with Stuart  
24 Cohen concerning your involvement in going to Columbia  
25 Artists Management?

2 A Same Declination.

3 THE COURT: I order you to answer, sir.

4 THE WITNESS: Same declination.

5 Q As a result of that conversation, or any conversa-  
6 tions, did you on the 26th of January 1972 go with certain  
7 individuals in a car from Brooklyn to Manhattan?

8 A Same declination.

9 THE COURT: I order you to answer.

10 THE WITNESS: Same.

11 Q Did you on the 26th of January 1972 go with an  
12 individual to the premises of Columbia Artists Management?

13 A Same declination.

14 THE COURT: I order you to answer.

ONLY COPY AVAILABLE

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

THE WITNESS: Same declination.

THE COURT: I think that is enough, Mr. Jaffe. Why don't you ask him one question to the effect as to whether or not he intends to decline on those grounds?

MR. JAFFE: Judge, may I have an identification of something first?

THE COURT: An identification of something? Yes, of course. What is it?

MR. JAFFE: I would like to just show the witness Court Exhibit 5 and ask if those were the statements that he made.

MR. ZWEIDON: Objection, your Honor.

MR. SLOTNICK: I would like to look at them before the witness is shown.

THE COURT: Let them look at it.

Q Mr. Smilow I show you Court Exhibit 5 for identification. Take a look at Court Exhibit 5.

Mr. Smilow, have you read Court Exhibit 5?

A Yes.

Q Having read Court Exhibit 5, is that an accurate transcript of the statements that you made before the Honorable Harry B. Frank on November 27, 1972?

MR. SLOTNICK: I object, your Honor. It is not

14 binding on my client. It is beyond January 26, 1972; the  
15 specific date in the indictment, and it is not in furtherance  
16 of anything that I know of having to do with this Court,  
17 plus the fact that--

18 THE COURT: If the jury were in the box, there is  
19 no question it would be a total improper question, Mr.  
20 Jaffe.

21 MR. JAFFE: I understand.

22 THE COURT: Why should I take it now.

23 MR. JAFFE: Your Honor, what we are trying to do  
24 is have the witness identify statements he has made before  
25 and ask him whether the statements are truthful and then  
2 ask him whether the statements are truthful and then ask  
3 him the same question--

4 THE COURT: Sustained.

5 BY MR. JAFFE:

6 Q Directing your attention to the month of June 1972  
7 Mr. Seilow, did you have any conversations with Sheldon  
8 Seigel?

9 A Same declination.

10 MR. SLOTNICK: Objection, your Honor.

11 MR. ZWEIBON: Objection.

12 MR. SLOTNICK: Again, I think the record will indi-

13 cate this is part of an objection I made as to other witnesses  
14 and is a continuing objection as to this witness.

15 THE COURT: What did you say?

16 THE WITNESS: Same declination.

17 THE COURT: I order you to answer.

18 THE WITNESS: Same.

19 Q Mr. Smilow is it your intention that to any other  
20 questions that I put to you that you will give the same  
21 declination and refuse to answer?

22 MR. SLOENICK: I object to that your Honor as not  
23 being part of the proceedings.

24 THE COURT: Overruled.

25 Q Sir?

2 THE COURT: Answer it?

3 THE COURT: You decline to answer whether you will  
4 continue to answer?

5 THE WITNESS: I will answer the same way.

6 THE COURT: You will answer the same way. All  
7 right.

8 MR. JEFFE: At this time, your Honor, the Govern-  
9 ment would ask the Court under Title 29, Section 1826A to

10 find that this witness is in contempt of Court and the  
11 Government's application is that the Court order he be  
12 remanded to the custody of the attorney general for the dura-  
13 tion of this proceeding until such time as he gives testimony  
14 before this Court.

15 THE COURT: Mr. Smilow, I want to explain something  
16 to you.

17 I am about to hold you in civil contempt. That  
18 means that I am going to order that you be placed in the  
19 custody of the Attorney General for the duration of the  
20 trial unless in the interim, in the meanwhile you indicate  
21 your willingness to answer the questions you have declined  
22 to answer today.

23 Do you understand?

24 THE WITNESS: I understand.

25 THE COURT: That is civil contempt, and the purpose  
2 of civil contempt is to induce you to break your silence.

3 There is another kind of contempt which is called  
4 criminal contempt, which has as its purpose punishment  
5 for the crime of contempt. The two are not exclusive. Do  
6 you understand what I have just told you?

7 THE WITNESS: Yes.



8 THE COURT: All right, Mr. Smilow. The Court  
9 finds you in civil contempt and it is the order of the Court  
10 that you be committed to the custody of the Attorney General  
11 for the duration of the trial or until such time as you  
12 answer the questions which you have declined to answer today.

13 Yes, Mr. Leighton?

14 MR. LEIGHTON: Your Honor, would you hear me on  
15 the question of bail?

16 THE COURT: Yes.

17 MR. LEIGHTON: This defendant is 18 years of  
18 age, he is currently completing his first year at City  
19 College, and he too, like the previous witness, is going  
20 through his final examination period at this time.

21 I believe he has three or two exams to complete  
22 before completing his first year at City College.

23 THE COURT: I will see to it that he gets a chance  
24 to complete his examinations.

25 MR. LEIGHTON: I think this defendant has other  
2 grounds of non-frivolous nature as opposed to the previous  
3 witness.

4 This witness has raised the question of double  
5 jeopardy which your Honor has already ruled upon. We have

6 also the question of the destroyed wiretaps which your Honor  
7 has already ruled upon; and this witness has an additional  
8 argument of a violation of due process in that Mr. Seigel,  
9 although a Government Agent and although he, Mr. Seigel,  
10 consented, did take down the conversations of this witness  
11 who has a case pending in the State Courts covering facts  
12 which are in this indictment.

13 I think this is a non-frivolous ground, I think it  
14 is a good ground for appellate review, and I would ask your  
15 Honor to consider setting bail in Mr. Smilow's case.

16 May I further add that Mr. Smilow is presently out  
17 on a \$3500 bail on the case pending in the State court. I  
18 would ask your Honor to set a bail in this case or release the  
19 defendant on his own recognizance.

20 THE COURT: I am not going to do that and the  
21 reason I am not going to do that is that unlike the usual  
22 appeal section in which the bail laws indicate that bail  
23 is to be granted unless certain conditions exist, the civil  
24 contempt statute which is quite the opposite way, quite the  
25 opposite way, and is cast in language which as I remember it,

2 says something like "the defendant shall not be admitted  
3 to bail unless," and I draw from that the conclusion that  
4 that law is to be construed as I have just suggested.

5 I reluctantly must tell you that I do not, cannot  
6 say that I record any of the grounds the witness has  
7 invoked here as substantial, and I shall not admit him to  
8 bail.

9 MR. BRIGHTON: Your Honor will direct the marshal  
10 to make an effort to see that this witness does take his  
11 examinations?

12 THE COURT: I order the marshal to see to it that  
13 this witness, as well as the previous one who has been com-  
14 mitted, will have an opportunity to take his examinations.  
15 I want that communicated to the marshal as I did in the  
16 other situation. These young men will have a chance to take  
17 their examinations, and that is an order.

18 MR. LEIGHTON: Your Honor, one further--

19 THE COURT: With respect to the kosher food thing,  
20 that has already been raised and I am going to have to ask  
21 the United States Attorney to convey my view that if it is  
22 in any way possible, that these people who are committed  
23 should have their dietary requirements respected.

24 MR. SLOTHICK: Your Honor, there is a case in some  
25 circuit court called Barrett against something. I remember

ONLY COPY AVAILABLE

2 reading it when I had the problem before Judge Weinstein in  
3 the Eastern District.

4 Judge Weinstein signed an order ordering the warden  
5 of the West Street Penetentiary to provide kosher food for  
6 the--in that case it was a defendant--and I believe he based  
7 his order upon the Barrett case.

8 MR. PUTZEL: We will do all we can, your Honor.  
9 I don't know of the case but I really represent to the Court  
10 that we will exercise our best efforts.

11 THE COURT: Better than that you suggest to the  
12 United States marshal that if he finds it difficult, I may  
13 just very well sign an order.

14 MR. PUTZEL: It won't be the marshal.

15 THE COURT: I mean the warden of that facility, that  
16 I may very well sign an order of the Court such as Judge  
17 Weinstein has previously signed.

18 In other words, I want something more than lip  
19 service when I say that I want these young men to be able to  
20 observe their religion and its tenents.

21 MR. PUTZEL: I understand, your Honor, and we will  
22 follow the spirit as well as the letter.

23 THE COURT: I think what I want you to convey is  
24 that I mean business.

25 MR. PUTZEL: I shall convey that, your Honor.

ONLY COPY AVAILABLE

2 THE COURT: All right.

3 MR. LEIGHTON: Thank you very much.

4 THE COURT: Gentlemen, I think we will recess  
5 now until 2 o'clock.

6 MR. PUTZEL: Your Honor, I was just thinking, we  
7 are going to recall Mr. Seigel. I have talked to Mr.  
8 Dershowitz with reference to what Mr. Seigel is going to say,  
9 and I do not think it is necessary to keep the jury here.  
10 Perhaps we should excuse the jury now.

11 THE COURT: We have had Mr. Huss, Mr. Smilow, Mr.  
12 Seigel, and the fourth fellow is--

13 MR. PUTZEL: Mr. Elbogen is not here and we will not  
14 be--

15 THE COURT: All right then we shall sit. You  
16 may step down, sir.

17 (Witness excused.)

18 THE COURT: We shall sit until we dispose of the  
19 Seigel thing and then we will let everybody go for the day.

20 MR. PUTZEL: All right, fine.

21 The Government calls Sheldon Seigel.

EXHIBIT "B" TO ORDER TO SHOW CAUSE

264

JEFFREY SMILOW, called as a witness in  
behalf of the government, was duly affirmed,  
and testified as follows:

THE COURT: I will hear you, Mr. Leighton.

MR. LEIGHTON: If it please the Court, I am  
Robert Leighton, 15 Park Row, New York. Before this witness  
is asked any question, your Honor, I would ask the Court  
to restrain the government from calling Jeffrey Smilow  
a witness on the basis that his identity is related  
because of the illegality surrounding the subject, the  
former belief which was decided by the Circuit Court of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE  
FOLLY SQUARE, NEW YORK, N.Y. CO 7-4440

EXHIBIT B

ONLY COPY AVAILABLE

1 mebr 20

Smilow-

2 Appeals of this circuit.

3 I believe yesterday in the decision it said that  
4 the knowledge of Mr. Seigel's whereabouts was tainted be-  
5 cause it was based on illegal wiretaps and illegal search  
6 of a vehicle that he possessed. It is our claim that under  
7 the Wong Son rule --

8 THE COURT: Weren't you aware of that rule  
9 before the appeal; hadn't you heard of it?

10 MR. LEIGHTON: I had, your Honor.

11 THE COURT: You made no application before for  
12 a hearing.

13 MR. LEIGHTON: I thought that in asking for the  
14 wiretaps, or a transcript of these wiretaps was tantamount  
15 to my asking for a hearing and I thought the Court in the  
16 interests of justice would direct a hearing be held in order  
17 to see whether or not taint was involved.

18 THE COURT: I am just going to let that pass  
19 without responding to it.

20 MR. PUTZEL: I would like to ask Mr. Leighton  
21 what his claim is, because it seems to me what he is stating  
22 here, your Honor, is that he is moving to suppress his  
23 client's testimony against Seigel, whom the Court of  
24 Appeals has found would give tainted testimony, was the  
25 person who revealed the drug case.

mebr 21

Smilow--

Is that the gist of what you are saying?

MR. LEIGHTON: That is right, Smilow's disclosure.

MR. PUTZEL: So you are conceding that Seigel was the source of our knowledge of Smilow; is that right?

MR. LEIGHTON: I am not conceding it, but that is a statement in the government's brief, that Mr. Seigel is the person from whom they learned of Mr. Smilow's whereabouts.

MR. PUTZEL: We so state that.

THE COURT: Now that that has been stated, what more do you want to prove?

MR. LEIGHTON: My statement is that the questions propounded to Mr. Smilow and Mr. Smilow's knowledge of participation or alleged participation were learned through Mr. Seigel and since Mr. Seigel was discovered through illegal means, Mr. Smilow discovered through Mr. Seigel, Mr. Smilow's -- therefore his testimony would be tainted under the Wong Son rule.

THE COURT: Yes.

MR. PUTZEL: As to that, your Honor, I believe that issue was squarely raised in the Court of Appeals and rejected. It was certainly argued in our brief. The taint as to Seigel has been found by the Court of Appeals.



1 mebr 22

Smilow-

2 and I am not going to discuss that here, but certainly  
3 there is a gross attenuation as to the fact that Smilow  
4 was discovered through Seigel. Smilow certainly has  
5 no standing to assert the taint claims that Seigel had  
6 and I believe that the Court of Appeals ruled squarely on  
7 that subject.

8 THE COURT: I have the opinion here. Point it  
9 out to me.

10 The government's concession eliminates the  
11 necessity for a factual hearing; is that right? He admits  
12 or indeed insists that Smilow's identity was learned from  
13 Seigel.

14 MR. LEIGHTON: That is the government's con-  
15 tention. I don't concede that that is the truth.

16 I have a second application also, your Honor.

17 THE COURT: What is it?

18 MR. LEIGHTON: The second application is that  
19 the government has conceded that there have been illegal  
20 wiretaps on the JDL office wherein the name Jeff has been  
21 heard plus many other wiretaps wherein no concession has  
22 been heard that the voice of Jeffrey Smilow was on these  
23 tapes.

24 At this time, your Honor, I would ask your  
25 Honor for a hearing to see whether or not there was any

ONLY COPY AVAILABLE

1 mebr 23

Smilow-

2 illegal evidence obtained concerning the defendant Smilow.  
3 I would ask your Honor for a hearing at this time to see  
4 whether or not there is any taint you'd have to decide.

5 THE COURT: Yes.

6 MR. PUTZEL: Our view as to that, your  
7 Honor, is that I believe Mr. Leighton is making absolutely  
8 inconsistent claims here and he has to choose which one he  
9 really wants to assert here.

10 THE COURT: Let me ask you this before we get  
11 into any further questioning of this man. Why isn't the  
12 record of his last questioning in which I informed him  
13 that he could be prosecuted for criminal contempt if he  
14 persisted, why is that record not sufficient for you to  
15 proceed in criminal contempt and let him raise those  
16 questions before any Judge who is involved in the trial  
17 of the criminal contempt.

18 MR. PUTZEL: In our view it is because the  
19 Court of Appeals squarely held in this matter that Smilow  
20 was aware of all of these circumstances and because he  
21 knew darn well that Seigel was the source of his identity,  
22 chose not to raise that motion and therefore waived that.  
23 It is on page 31 of the opinion.

24 THE COURT: Let me see it, please.

25 MR. PUTZEL: The last paragraph.

ONLY COPY AVAILABLE

mcbr 24

smilow-

(Pause.)

THE COURT: I have read that.

Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

THE WITNESS: No.

MR. PUTZEL: May we mark as an exhibit the transcript of June 2, 1972 starting at page 173?

MR. ZWEIGON: Is this a transcript in this proceeding?

THE COURT: Yes. I don't think we need to mark it. You can direct my attention to it and counsel's attention to it.

MR. PUTZEL: Directing the Court and counsel and the witness' attention to the transcript beginning at page 173, we would ask Mr. Smilow to take a look at the transcript, to look at the questions that were asked him, and tell us whether it is his continued intention to refuse to answer those questions.

MR. LEIGHTON: Prior to Mr. Smilow being requested to do that, I would ask your Honor at this time to direct that a hearing be held to decide whether or not the wiretap in question on the JDL office did in fact have information which led to the whereabouts of Mr. Smilow.

ONLY COPY AVAILABLE

1 mebr 25

Smilow-

270

2 and whether or not it is tainted.

3 THE COURT: I decline to do so. I am not  
4 even going to ask him anything today other than the fact  
5 that he would persist in his refusals to answer. Beyond  
6 that I think the record is sufficient to proceed against  
7 him, as I warned him the last time, for criminal contempt,  
8 and the United States Attorney advises me that he is going  
9 to do it based on the record the last time at which you made  
10 no such request.

11 Then if you want to take it up with the trial  
12 judge, whoever it may be, in his criminal contempt case,  
13 that may be the place to do it. But for now I believe,  
14 and I advise you, sir, that your failure to answer questions  
15 which you are now looking at at the last session which you  
16 were called upon to testify constitutes criminal contempt of  
17 court and that the punishment for criminal contempt is without  
18 limit.

19 Is that clear?

20 THE WITNESS: Yes.

21 MR. LEIGHTON: Is your Honor going to allow  
22 the United States Government to ask of Mr. Smilow questions  
23 concerning this record?

24 THE COURT: No, the record is clear.

25 MR. PUTZEL: I think the record is perfectly

ONLY COPY AVAILABLE

mchr 26

Smilow-

clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and, accordingly, pursuant to Rule 42B of the federal rules of criminal procedure we will move this court through an order to show cause on papers to have Mr. Smilow cited for criminal contempt.

I would ask the Court to inquire of Mr. Smilow whether he was in court just previous to this during the time when Mr. Huss was advised by the Court of the consequences of refusal to testify.

THE COURT: Were you here when I dealt with Mr. Huss a few moments ago; were you in the courtroom?

THE WITNESS: Yes.

THE COURT: You heard the entire --

THE WITNESS: Yes.

THE COURT: -- situation, all the questions and everything I said to Mr. Huss?

THE WITNESS: Yes.

THE COURT: All right.

MR. PUTZEL: Our application is that Mr. Smilow be arrested and that bail be fixed in the amount of \$50,000.

THE COURT: I will hear you.

MR. LEIGHTON: Your Honor, on the question of

272

1        rebr 27

Smilow-

2        bail, you are fully familiar with the background of this  
3        witness. He has been before your Honor several times.  
4        To touch the highlights, I believe he is 18 years old and  
5        he is a freshman at City College. He has been before  
6        this court several times. He has been before Judge  
7        Weinfeld, I believe, in another proceeding several times.  
8        He appeared in court on each and every occasion.

9                He lives at home with his parents. They  
10        reside in Kings County. His mother is here in court and  
11        has been here each and every occasion.

12                This witness is presently out --

13                THE COURT. Do you know who isn't in court  
14        today? Iris Cones.

15                Go ahead.

16                MR. LEIGHTON: This witness is presently in-  
17        dicted in the state court on charges arising out of charges  
18        in this indictment. He is presently out on bail at  
19        \$3,500 in the State Court. That case is still pending.

20                I believe that the defendants in this case  
21        have been released on \$25,000 bail. I know the government  
22        has requested \$50,000. Your Honor has set \$50,000 bail  
23        on the prior witness. I would respectfully urge upon  
24        your Honor to set a more reasonable bail because \$50,000  
25        bail would be tantamount to no bail at all for this

ONLY COPY AVAILABLE

1        mabr 23

Smilow

2        defendant -- for this witness.    He will be --

3                THE COURT:    He is about to be a defendant.

4                MR. LEIGHTON:    He will not be able to raise that  
5        bail.    I ask your Honor to consider if the Court is going to  
6        impose a \$50,000 bail that the Court consider a higher  
7        personal recognizance bond and allow a \$3,000 or \$2,000 cash  
8        security to be placed with the signature of his mother  
9        and father as guarantors of this defendant's presence in  
10       court.

11               THE COURT:    I am going to fix \$50,000 cash or  
12        surety bond.    If the Court or Appeals decides the bail  
13        is excessive -- they are on the 17th floor and that is what  
14        they are there for.    Bail is fixed in the sum of \$50,000.

15               MR. LEIGHTON:    Thank you, your Honor.

16               THE COURT:    You may step down, Mr. Smilow.

17               (Witness excused.)

18               MR. PUTSEL:    It is intended to serve counsel  
19        for Mr. Hays and Mr. Smilow with formal papers this  
20        afternoon citing them for criminal contempt for their  
21        wilful refusal to answer questions.    We would ask this  
22        Court to fix a date by which that motion should be returned  
23        and the order to show cause.

24               THE COURT:    No.    I want to explain to you that  
25        I think that when there are criminal contempt cases come up it is

ORDER TO SHOW CAUSE AND EXHIBITS



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

:

-v-

RICHARD HUSS,

Defendant.

:

----- X

ORDER TO SHOW CAUSE  
Re: 72 CR. 778 A.B.

Sufficient cause appearing therefor, it is hereby  
ORDERED pursuant to Rule 42(b), Federal Rules of  
Criminal Procedure that Richard Huss show cause before this  
Court on July 3, 1973 at 10:30 a.m. in Room 110 of the  
United States Courthouse, Foley Square, New York, New York,  
why he should not be adjudged in criminal contempt of Court  
for his wilful refusal to answer questions put to him at  
the trial of United States v. Stuart Cohen and Sheldon Davis,  
72 Cr. 778, as more fully set forth in the accompanying  
affidavit.

IT IS FURTHER ORDERED that service of this order  
to show cause on Richard Huss on or before 5:00 p.m., June  
28, 1973, be deemed good and sufficient service.

IT IS FURTHER ORDERED that, for the reasons  
stated by me in open Court, Richard Huss be arrested by the  
United States Marshal, and



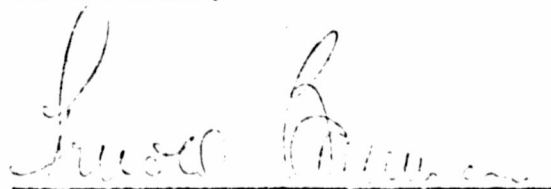
IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, bail shall be fixed in the amount of \$50,000 cash or surety bond, and the defendant shall be remanded to the custody of the Attorney General or his duly authorized representative if he is unable to post such bail.

IT IS FURTHER ORDERED that the United States Attorney for the Southern District of New York or any Assistant United States Attorney be and they hereby are appointed and directed to prosecute said Richard Huss on behalf of this Court.

Dated: New York, New York

June 28, 1973

SO ORDERED:

  
\_\_\_\_\_  
ARNOLD EGAN  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

-v- :

AFFIDAVIT

RICHARD HUSS, :

Defendant. :

- - - - - x

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

HENRY PUTZEL, III, being duly sworn, deposes  
and says:

1. I am an Assistant United States Attorney in  
the office of Paul J. Curran, United States Attorney for the  
Southern District of New York and, as such, was in charge of  
the prosecution of the case of United States v. Stuart Cohen  
and Sheldon Davis, 72 Cr. 778. I make this affidavit in  
support of the Government's application for the issuance of  
an order directing Richard Huss to show cause why he should  
not be held in criminal contempt for wilfully refusing to  
obey the Court's lawful order to answer questions put to him  
during the criminal trial of United States v. Stuart Cohen  
and Sheldon Davis, 72 Cr. 778.

2. On May 30, 1973, a jury was duly empaneled in  
this District to hear the criminal case of United States v.

Stuart Cohen and Sheldon Davis, 72 Cr. 778. On June 8, 1973 Richard Huss was called to testify as a witness in said case and was duly placed under affirmation.

3. On June 8, 1973, after Huss had asserted his privilege against self-incrimination the Court conferred immunity upon him pursuant to Title 18, United States Code, Sections 6002 et seq. Thereafter, the said Richard Huss did wilfully and without just cause refuse to obey the Court's lawful order to answer the questions put to him by counsel for the Government. The Court thereupon adjudged Huss in civil contempt of Court pursuant to Title 28, United States Code, Section 1826 and ordered that he be imprisoned until he should purge himself of his contempt by answering the questions as ordered by the Court or until the conclusion of said trial. The Court also explicitly advised Huss at that time that, should he persist in his wilful refusal to obey the Court's lawful order, he would be subject to punishment for criminal contempt.


4. On June 26, 1973 the United States Court of Appeals for the Second Circuit affirmed the judgment of civil contempt. On June 27, 1973, Richard Huss was again placed under affirmation in the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778 and thereupon

repeated his refusal to answer the questions previously put to him and refused to obey the Court's further order to answer additional questions. The Government thereupon stated that it was unable to proceed with the prosecution of the charges at bar, and the trial was thereupon terminated.

5. I attach herewith and incorporate as a part of this affidavit the transcripts of proceedings of June 8, 1973 (Exhibit A) and of June 27, 1973 (Exhibit B).

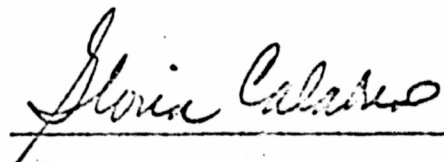
6. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that the order to show cause be issued.

  
HENRY TUTZEL, III  
Assistant United States Attorney

Sworn to before me this

28<sup>th</sup> day of June, 1973

  
\_\_\_\_\_  
Gloria Calabrese

GLORIA CALABRESE  
Notary Public, State of New York  
No. 240535340  
Qualified in Kings County  
Commission Expires March 30, 1975

ONLY COPY AVAILABLE

23 R I C H A R D H U S S, called as a witness by the  
24 Government, duly affirmed by the Clerk of the Court,  
25 testified as follows:

2 MR. ARTHUR MILLER: May it please the Court,  
3 my name is Arthur Miller, attorney for Mr. Huss.

4 At this time your Honor, the authority of Tane  
5 against United States, I would like to request the Court  
6 that they refrain from calling Mr. Huss as a witness, and  
7 that the Government learned of Mr. Huss through illegal  
8 wiretapes and illegal pressure put on specifically the Jewish  
9 Defense League offices and the previous witness in this  
10 case Mr. Sheldon Seigel.

11 MR. JAMES: Your Honor, with respect to Mr. Huss,  
12 we have an affidavit with regard to the CIA wiretaps which  
13 we were directed to get last time we were in Court.

14 That affidavit which is Court Exhibit 3 covers  
15 Mr. Huss.

16 We have the telegram from the Department of Justice  
17 on the 29th of May 1973 indicating that there were no--there  
18 was no electronic surveillance of Mr. Huss.

19 We have the former FBI representations which were  
20 made during the hearing in February to the effect that there  
21 were no overhearings of Mr. Huss. We will have an affidavit  
22 which we will put before the Court from the Department of

23 Justice indicating that there were no electronic overhearings  
24 of any kind of Mr. Huss.

25 THE COURT: How about his point that you learned  
2 of his existence through illegal wiretaps?

3 MR. JAFFE: We are prepared at this time, your  
4 Honor, to show that the existence of Mr. Huss was obtained  
5 from Sheldon Seigel by Detective Parola. Detective Parola  
6 is here and we are ready at this time to go forward.

7 Your Honor, with regard to his allegation of pres-  
8 sure on Mr. Seigel, the Government would assert that at  
9 this time Mr. Huss has absolutely no standing to raise that  
10 issue.

11 His standing would not come into being until he  
12 was held in contempt.

13 With regard to the wiretap issue, he does have  
14 that standing and the representations which are made by the  
15 Department of Justice would indicate that there was no  
16 electronic surveillance on which he was overheard.

17 MR. SLOTNICK: Your Honor, with regard to that,  
18 as I read Tane, the defendants have standing to move to  
19 suppress any evidence, witness, or material that they feel  
20 has been brought into the courtroom based upon an illegal  
21 action of the Government, so on behalf of the defendants, I

50

22 so move to exclude this witness from testifying based upon  
23 the illegal activities of the Government.

24 MR. JAFFE: I move under Alcoran that be in  
25 correct position.

2 THE COURT: Denied.

3 All right. Go ahead.

4 DIRECT EXAMINATION

5 BY MR. JAFFE:

XX

6 Q Would you state and spell your name, please?

7 A Richard Huss.

8 Q Will you tell us where you live?

9 A 5 Staten Island Boulevard.

10 Q Would you tell us your age?

11 A I respectfully decline to answer this series of  
12 questions on the grounds that my testimony may tend to  
13 incriminate me. Also it is my understanding of the Jewish  
14 Law that I am prohibited from testifying against another  
15 Jew in a non-Jewish tribunal and on the grounds that any  
16 contrary interpretation of Jewish Law made binding on me  
17 is itself a further violation of basic Jewish Law.

18 MR. JAFFE: Your Honor, at this time we would hand  
19 up to the Court an application we attempted to file last  
20 week with regard to immunity for Mr. Huss.

ONLY COPY AVAILABLE

21 I will hand a copy of that application to Mr.  
22 Miller, and I will hand to the Court a letter, the original  
23 of a letter from Henry B. Petersen, Assistant Attorney  
24 General, authorizing the United States Attorney to make that  
25 application.

2 A copy of that letter is included in the applica-  
3 tion.

4 THE COURT: Have you shown this order to his lawyer?

5 MR. JAFFE: Yes, I have, your Honor.

6 MR. MILLER: Yes, I have it, your Honor.

7 THE COURT: I am inclined to change one word of  
8 this, Mr. Jaffe. In the last paragraph of the order, it  
9 says this order shall become effective only after the date  
10 of this order.

11 I am inclined to change the word "date" to "after  
12 the signing of this order."

13 MR. JAFFE: I agree, your Honor.

14 MR. SLOTNICK: Your Honor, I would on behalf of  
15 the defendant, and I state that I believe I have standing  
16 to challenge this--

17 THE COURT: I don't believe you have standing to  
18 talk about whether I could confer immunity on this man who  
19 is represented by counsel. I don't believe so at all.



20 MR. SLOTHICK: This is a way of attempting to force  
21 him to give evidence against my client.

22 THE COURT: But he is not your client.

23 MR. SLOTHICK: Then, your Honor will not allow me  
24 to make an objection, for regard to is unity?

25 THE COURT: That's correct with respect to this,  
2 yes.

3 MR. ZWEIBON: May we both have an exception to  
4 that, your Honor?

5 THE COURT: Yes.

6 MR. JAFFE: I believe your Honor we would hand  
7 that to the clerk and have it filed.

8 MR. JAFFE: With regard to the second prong of  
9 Mr. Huss' statement that he just read, that he declines to  
10 answer questions on the basis of his religious beliefs,  
11 we would direct the Court's attention to the opinion in  
12 United States versus Shilow.

13 THE COURT: I am familiar with it and I adhere  
14 to it.

15 BY MR. JAFFE:

16 Q Mr. Huss, directing your attention to January 26,  
17 1972, specifically, to the morning of that day, did you  
18 see the defendants Stuart Cohen and Sheldon Davis on that  
19 day?

ONLY COPY AVAILABLE

20 THE COURT: Before you answer that question, Mr.  
21 Huss, I want to explain to you that I have just signed an  
22 order which confers immunity on you, and which prevents the  
23 use of anything you say against you.

24 I am going to give you a moment or as much time  
25 as you like, Mr. Huss, to talk to your lawyer so that he can  
2 explain to you the legal significance of what it is I have  
3 done in signing this order I have just signed.

4 You may step down.

5 MR. JAFFE: Your Honor, before the witness steps  
6 down, would the Court also admonish the witness that it is  
7 the Court's opinion that the other basis stated for refusal  
8 to answer, specifically the religious grounds, is not a  
9 valid basis and that he consult about that?

10 THE COURT: Yes, Mr. Huss, your lawyer knows the  
11 case of United States v. Smilow, I have no doubt, but another  
12 Judge of this Court has ruled upon that same objection in  
13 the case of Mr. Smilow, and has held it to be not a valid  
14 ground for refusal to answer.

15 The substance of what I have said is that I agree  
16 with the ruling of that Judge, Judge Weinfeld by name, with  
17 respect to the claim based upon religious scruples, and  
18 advise you that it is not a proper basis on which you may

10 refuse to answer.

20 MR. MILLER: May I please the Court, I do not have  
21 a copy of the second Smilow decision. I had a different  
22 copy which does not discuss the religious issue. However,  
23 I would like to point out that I believe that the religious  
24 issues will be raised which Mr. Huss is relying on, while  
25 similar to the issues raised by Mr. Smilow, are in effect  
2 different, and would like to have an opportunity for this  
3 witness to be heard on the religious issues at this time.

4 THE COURT: I will permit it.

5 MR. MILLER: Thank you.

6 THE COURT: The issue by the way, as I remember  
7 it sir, is exactly the one Judge Weinfeld wrote about in  
8 the Smilow case, namely, as I remember the opinion, that  
9 Smilow claimed that it would violate his Judaic beliefs to  
10 inform, and I understand that to be the basis of Mr. Huss'  
11 refusal.

12 Am I right about that?

13 MR. MILLER: It is similar but it is different  
14 in very material aspects.

15 THE COURT: How does it differ?

16 MR. MILLER: Well: it's not that he's not willing  
17 to inform. Or there are two bases for his refusing to  
18 testify. The first is whether or not this Court in fact

19 does have jurisdiction over two Jewish parties. I believe  
20 Judge Weinfeld's decision in effect has ruled that under  
21 Jewish Law this Court does in fact have jurisdiction over  
22 Mr. Huss to testify or Mr. Smilow to testify.

23 However, Jewish Law is very, very settled on the  
24 fact, and I quote from a book called the Code of Jewish Law,  
25 which is a compilation of law affecting the conduct of a  
2 Jewish person from the time he wakes up in the morning until  
3 the time he wakes up the following morning, and with respect  
4 to one's testimony in Court, it discusses the issue of  
5 whether or not Mr. Huss is even permitted to be called in  
6 this Court, but as you stated Judge Weinfeld has ruled that  
7 he is required to testify.

8 THE COURT: I might say that case has been affirmed  
9 by the Court of Appeals as I understand it.

10 MR. MILLER: However, the Jewish Law goes one step  
11 further. It does not permit a witness to testify in a non-  
12 Jewish Court where the punishment or the verdict against  
13 the defendants in the case, if they are Jewish, would be  
14 different than the verdict which would be rendered in a  
15 Jewish Court.

16 Now, Jewish Law states that testimony of a witness

17 who accepts a reward for testifying is null and void. It  
18 has no effect whatsoever. I submit to this Court that by  
19 granting of immunity upon this witness for his testimony,  
20 he has been rewarded with some form of remuneration, basically  
21 freedom from prosecution in case he should say anything which  
22 would incriminate him.

23 THE COURT: Freedom from the use of his testimony?

24 MR. MILLER: Use of his testimony, yes.

25 In view of the fact that he has received this  
2 grant of immunity from prosecution, according to Jewish Law,  
3 his testimony in a Jewish Court would be null and void; and  
4 since his testimony would not be admissible in a Jewish  
5 Court, Jewish Law goes further and states, and again I read--  
6 and if counsel requests, I can provide him with a copy--in  
7 effect it says that if a Jew testifies against another Jew  
8 who became liable to a larger sum--and the term larger sum  
9 is used with respect to monetary compensation but it holds  
10 equally true with respect to punishment for an act--

11 THE COURT: What makes you say that?

12 MR. MILLER: That is the interpretation.

13 THE COURT: You are talking about suits for money?

14 MR. MILLER: No, they are not talking about suits  
15 for money. They have used that word, that phrase. However,  
16 it deals with conduct in Court in general. There is no

17 specific limitation to it.

18 THE COURT: All right.

19 MR. MILLER: It states quite, clearly that if a  
20 Jew will cause someone to be liable for a larger sum of  
21 money then he would be in a Jewish Court, he is not allowed  
22 to testify, a complete prohibition against testimony.

23 Going back, that his testimony is null and void,  
24 if this witness were compelled to testify in this Court,  
25 and giving testimony which in effect is null and void, he  
2 will in effect be bearing a false witness, which is in clear  
3 violation of a commandment in the Ten Commandments, which  
4 prohibits a witness from bearing false testimony.

5 Now, the Ten Commandments, or requesting a witness  
6 to take an act, affirmative act, which clearly violates a  
7 cardinal precept of his religion goes far beyond a mere  
8 interest of the State, of a police power of the State to  
9 have this witness testify.

10 This is asking him to violate a basic precept  
11 of Jewish religion.

12 THE COURT: Mr. Huss, you hear what your lawyer  
13 is saying, do you not?

14 THE WITNESS: Yes.

15 THE COURT: Is that the basis of your objection  
16 on religious grounds?

17 THE WITNESS: Yes, it is.

18 MR. MILLER: There is a second ground.

19 This witness has been advised by his spiritual  
20 leader that this Court does not have any jurisdiction whatso-  
21 ever.

22 Now, I submit that Judge Weinfeld's decision  
23 may or may not be correct according to Jewish Law. However,  
24 Jewish Law is equally clear that one does not--when one  
25 has a question as to Jewish Law he consults his rabbi and  
2 his rabbi only. The decision he gets from his rabbi is com-  
3 pletely binding upon him.

4 If he gets a decision he does not like or he wants  
5 an adverse determination, he is prohibited from going  
6 further and seeking additional rabbinical advice.

7 The basis for this really comes from the Talmud  
8 and a Tractate, which deals with the rules and regulations  
9 of conduct upon the Sabbath; and in the Talmud it states the  
10 story of one rabbi who held that Saturday where he is per-  
11 mitted to have a circumcision for a newborn baby, he is  
12 permitted to chop down trees and sharpen the knife--

13 THE COURT: Isn't it getting a little far afield?

14 MR. MILLER: It will lead right into it if your  
15 Honor will permit me.

16           The Talmud goes on and the commentary goes on to  
17 state that every other rabbi except for this one rabbi  
18 named Rabbi Eleazer, who lived in a town in Israel holds  
19 that this is a violation of the law of what you are permitted  
20 to do on Saturday.

21           The Talmud goes on to state that nevertheless the  
22 followers of this rabbi who folled his rules and cut down  
23 the trees and committed these acts on Saturday are rewarded  
24 with the highest reward permitted under Jewish Law, which  
25 in effect would be they are entitled to the world to come  
2 even though they violated the Sabbath, punishment of which  
3 is death, and the reason for it is that despite the fact  
4 that they violated the Sabbath they were worthy of this  
5 reward because they did one step which was even higher than  
6 the Sabbath and that was listening to their rabbi despite  
7 all admonitions to the contrary.

8           And again this book Code of Jewish Law, when it  
9 talks about the honor one should give--

10           THE COURT: I understand what you have said. Do  
11 you understand, Mr. Huss what your lawyer has said?

12           THE WITNESS: Yes, I do.

13           THE COURT: Is that too part of the basis of your  
14 refusal to answer on religious grounds?

15           THE WITNESS: Yes, it is.

ONLY COPY AVAILABLE



16 THE COURT: All right.

17 MR. MILLER: If I may just quote, it says that a  
18 person must honor and revere his teacher more than his  
19 father because his father has given life in this world while  
20 his teacher prepares him for life in the world to come.

21 Now we know again that the Ten Commandments requires  
22 the honoring of one's father. Yet, according to Jewish Law,  
23 which is uncontradicted by any rabbinical authorities what-  
24 soever, the law of the Rabbi is to give to his Rabbi by  
25 following every command which he states and every interpre-  
2 tation which he gives you, is greater than even the honor  
3 which is required of you in the Ten Commandments.

4 I submit to this Court that the principles which  
5 this witness is relying on are basic cardinal precepts of  
6 Jewish Law that cannot be refuted by any other religious  
7 authorities.

8 The Supreme Court of the United States has stated  
9 in the case of Sherbert v. Verner--

10 THE COURT: Do you have the citation?

11 MR. MILLER: 384 United States reports 398.

12 In that court in that decision the Court decided  
13 that where a cardinal principle was involved of Jewish Law--  
14 it did not deal with Jewish Law--with a cardinal principle  
15 after religion was involved the Court would not while it

16 did not deal with a contempt citation in their issue, would  
17 not hold the defendant in violation of that law.

18 I submit that we have in this case clear instances  
19 of very, very cardinal principles of Jewish Law. In both  
20 instances they are derived from the Ten Commandments and  
21 for the Court to tell this witness that he is to take an  
22 act which violates this basic principle of Jewish Law is an  
23 infringement of his religious rights, the practice of his  
24 religion which is prohibited by the First Amendment to the  
25 Constitution.

2 THE COURT: The objection based on religious  
3 grounds is overruled.

4 MR. MILLER: I except.

5 THE COURT: I would like you to talk to your  
6 client, please, explain to him -- you may step down, Mr.  
7 Huss -- the significance of the order I have just signed.

8 MR. JAFFE: Shall we proceed with Mr. Smiley?

9 THE COURT: We will take a five-minute recess  
10 because I want counsel to have an opportunity to talk to  
11 his client.

12 (RECESS.)

13 THE COURT: Madam, if you do that again, the  
14 Court will direct the marshals to expel you. You in the  
15 front row. If that happens once more, the marshal will

T3

ONLY COPY AVAILABLE

16 exclude you from the courtroom.

17 THE MARSHAL: Yes, your Honor.

18 EXAMINATION BY MR. JAFFE:

19 Q Mr. Huss, directing your attention to the  
20 morning of January 26, 1972, did you see Sheldon Davis on  
21 that morning?

22 A I respectfully decline to answer this series  
23 of questions on the grounds that it is my understanding  
24 of Jewish law I am prohibited from testifying against  
25 another Jew in a non-Jewish tribunal and on the grounds  
2 that any contrary interpretation of Jewish law made against  
3 me is a further violation of the Jewish law.

4 THE COURT: Do you understand I have over-  
5 ruled that objection?

6 THE WITNESS: Yes, your Honor.

7 THE COURT: All right.

8 Q Mr. Huss, on the morning of January 26, 1972,  
9 did you drive in a car with Sheldon Davis and other  
10 people from Brooklyn into Manhattan?

11 A I respectfully decline to answer --

12 THE COURT: You may say same declination.

13 THE WITNESS: Yes, your Honor.  
14

THE COURT: You decline to answer on the same ground?

THE WITNESS: Yes, sir.

MR. JAFFEN: Would you order the witness to answer that?

THE COURT: I order you to answer the question, Mr. Witness.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you have a discussion with Mr. Davis and other individuals concerning the placement of an attache case at the premises of either Hurec Concerts, Incorporated or Columbia Management Artists, Incorporated?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

You may answer.

A Same declination.

THE COURT: I order you to answer.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you go with an individual named Jerome Zellerkraut, also known as Jerry Zeller, to the offices of Hurec Concerts and there place an attache case and ignite it?

14 MR. SLOTNICK: I object to the question, one, A,  
15 as being improper and not binding upon my client and, B,  
16 as a continuation of a charade I find rather distasteful.

17 THE COURT: Overruled.

18 MR. SLOTNICK: There are members of the press  
19 in the courtroom and certainly we have --

20 THE COURT: If you continue to speak after I  
21 have ruled, sir, you are going to run into trouble.

22 MR. SLOTNICK: I haven't finished.

23 THE COURT: Yes, I have.

24 MR. SLOTNICK: I can't stop. I object.  
25 for the record, your Honor.

2 MR. ZWEIFON: I join in the objection.

3 THE COURT: Go ahead.

4 Q Would you answer that question, Mr. Huss?

5 A Same declination.

6 THE COURT: I order you to answer, Mr. Huss.

7 A Same declination.

8 Q Were you at any time on the morning of January 26,  
9 1972, in the company of Sheldon Davis, Jerome Zellerkraut  
10 also known as Jerry Zeller, Murray Elbogen and an individual  
11 named Murray Elbogen?

12 A Same declination.

13 MR. SLOTNICK: Most respectfully again I  
14 object and say since your Honor doesn't want me to state  
15 for the record --

16 THE COURT: State it for the record.

17 MR. SLOTNICK: That those questions are not  
18 binding on my client and are aimed toward prejudicing my  
19 client and for each and every reason I stated before.

20 THE COURT: Overruled.

21 You may answer.

22 A Same declination.

23 THE COURT: I order you to answer, Mr. Huss.

24 A Same declination.

25 Q Mr. Huss, prior to January 26, 1972, within a  
2 period of time from about two weeks before that date, that  
3 is, from two weeks before January 26, 1972, through January  
4 26, 1972, did you have any discussions with Sheldon Davis  
5 or Stuart Cohen or with the individuals Murray Elgoban,  
6 Jeffrey Smilow or Jerome Zellerkraut concerning placement  
7 of any attack cases or incendiary devices at either Hurec  
8 Concours, Incorporated, or Columbia Artists Management?

9 MR. SLOTNICK: I object to the form of the  
10 question, one, it asks for conversations that have been  
11 allegedly out of the hearing of my client.

12 Two, it is a continuation of a charade I find  
13 to be very distasteful, and ask the Court at this point if

ONLY COPY AVAILABLE

14 the witness is going to be held in contempt that that  
15 procedure be accomplished.

16 THE COURT: You are not his lawyer, sir.

17 MR. SLOTHNICK: I am not his lawyer, but I am  
18 Mr. Cohen's lawyer.

19 THE COURT: I understand that. I don't  
20 regard this as a charade at all. He is asking questions  
21 that bear on the allegations of the indictment. The  
22 witness has consistently refused to answer and is heading  
23 in the direction of a contempt, and I shall deal with that  
24 at the appropriate time.

25 MR. MILLER: May I join in the objection of Mr.  
2 Slotnick and say that the government by its parade of  
3 questions is assuming facts contained in the questions  
4 knowing perhaps that the declinations are coming and is  
5 trying the case for the Press and not for the Court's  
6 benefit.

7 THE COURT: I don't really think so and I am  
8 asking them to go no further.

9 MR. MILLER: I was going to suggest whether  
10 Mr. Huns has indicated he will rely on the religious  
11 privilege and regard those rules which prohibit him from  
12 testifying, with all due respect to the power of this Court  
13 and continuing to ask him questions which we know he will

14 not testify to is just trying to build up the number of  
15 times by which he is disobeying the Court's command.

16 I feel that he is relying on one principle  
17 and no matter how many questions he is asked he is not  
18 going to answer them.

19 THE COURT: You may answer.

20 A Same declination.

21 THE COURT: I order you to answer.

22 A Same declination.

23 THE COURT: I don't really see much point in  
24 going on.

25 MR. JAFFE: We were going to inquire whether  
2 it was his intention to give the same declination if other  
3 questions were put to the witness.

4 THE COURT: You may answer that.

5 THE WITNESS: Yes.

6 MR. JAFFE: At this time we would ask that the  
7 Court make the finding that Mr. Huss is in contempt of this  
8 Court and ask that he be remanded to the custody of the  
9 Attorney General until such time during this proceeding  
10 that he be recalled and give testimony before this Court.

11 THE COURT: Before you say anything -- I will  
12 hear you, of course -- Mr. Huss, I find you in contempt of



13 this Court. There are two kinds of contempt that I  
14 want to tell you about.

15 One is civil contempt, which provides for your  
16 incarceration during the course of this proceeding but  
17 leaves the keys to the prison with you in that if you  
18 decide to answer at any time you will be released.

19 The second kind of contempt is a criminal  
20 contempt which does not look for answers but is meant as  
21 punishment for your contemptuous conduct in refusing to  
22 answer questions.

23 I instruct you, sir, that a civil contempt does  
24 not include criminal contempt.

25 I find the witness in contempt of court. I will  
2 hear you, sir.

3 MR. MILLER: With respect to your Honor's finding,  
4 it is our intention to file an appeal with the United States  
5 Court of Appeals on several issues, the first of which  
6 naturally are the religious issues and, second of all,  
7 on the authority of the taint by the United States, and  
8 based on those matters I request that the witness not be  
9 remanded pending a determination.

10 THE COURT: Explain your second argument to me,  
11 please, at a little greater length.

12 MR. MILLER: That they discovered the identity of  
13 this witness through wiretaps and pressure placed on the  
14 witness Soigel without which they would not have learned  
15 the identity of Mr. Huss.

16 THE COURT: I have already ruled to the con-  
17 trary.

18 MR. MILLER: We intend to appeal on that issue.

19 THE COURT: But you are aware that I have ruled?

20 MR. MILLER: Yes.

21 THE COURT: To the contrary.

22 MR. MILLER: And it is our intention to appeal  
23 both issues and it is my request that pending final deter-  
24 mination of this appeal in this case, that the witness  
25 Mr. Huss not be removed pending the final determination  
2 on appeal.

3 MR. JAFFE: Your Honor, with respect to the issues  
4 on appeal, the government's position is both those issues  
5 are frivolous. With regard to the religious issue, that  
6 was decided by Judge Weinfeld, written on by Judge  
7 Feinberg in the Court of Appeals, and although subsequently  
8 the Smilow case was reversed it was reversed for other  
9 grounds than the religious determination grounds by Judge  
10 Feinberg and is still the law of the circuit.

11 With regard to the taint --

12 THE COURT: I must put on the record without any  
13 disrespect for anybody's religious beliefs, the fact that  
14 the matter has been determined, has been ruled upon by our  
15 Court of Appeals and in a legal sense then I am telling you  
16 I am using frivolous as a word of art, that I find that  
17 basis frivolous.

18 MR. MILLER: Your Honor, here is the decision  
19 written by Judge Feinberg and he dispels the religious  
20 issue in a footnote and I have no way of knowing whether  
21 he considered the same authorities or the same issues which  
22 I have raised. It is my understanding after speaking to the  
23 counsel named on the Judge's opinion that the same issues  
24 were not raised.

25 THE COURT: As I remember Judge Weinfeld's opinion,  
2 it dealt exclusively I believe and mostly with the informant  
3 aspect and the refusal was an additional problem, but I  
4 do not regard them of a sufficient degree of variation to  
5 regard them differently from the Smilow case.

6 MR. JAFFE: With regard to the second issue,  
7 your Honor, it is the government's position first that  
8 this witness has no right to raise any objection to any  
9 of the information as did the witness Smilow. However,

10 if the Court should find that he does have standing, which  
11 we certainly contend he doesn't, it is our position that  
12 the Court already held the hearing and made that deter-  
13 mination with regard to Seigel.

14 THE COURT: That matter is in the Court of  
15 Appeals.

16 MR. JAFFE: That is correct. The issue, the  
17 standing issue is frivolous. If the Court wishes at  
18 this time we have Detective Forola available -- excuse me,  
19 your Honor.

20 (Pause.)

21 MR. JAFFE: Your Honor, I don't wish to belabor  
22 the issue as to standing. The point is that the wiretap  
23 taint issue that they seek to raise was raised with regard  
24 to the witness Seigel and that is on appeal.

25 With regard to this particular witness, he has  
2 no standing to raise the issues raised by Seigel and,  
3 therefore, that is the issue we contend is a frivolous  
4 issue on appeal.

5 THE COURT: I have previously ruled in connection  
6 with Seigel that it seems to me that the government was  
7 not led to him as a result of illegal wiretapping.

8 MR. JAFFE: That is correct, your Honor.

ONLY COPY AVAILABLE

9 MR. PUTZEL: If I may be heard for one moment,  
10 I don't mean to tread on my brother Jaffe's toes, but it  
11 seems there is a very important distinction here. Let us  
12 as usual for the moment treat Seigel, for the purpose of this  
13 argument alone, as discovered by wiretaps. We would  
14 urge most strenuously that assuming that Seigel later was  
15 a person who gave us the information concerning Mr. Hues  
16 as he has claimed is the case, we would say that he has  
17 absolutely no standing to assert the wiretap claims of  
18 Seigel.

19 He is taking Seigel's position which he also  
20 contests before your Honor on step beyond that, and I  
21 submit that the chain is much too weak to support his  
22 standing.

23 THE COURT: What is the key issue in the Seigel  
24 matter in the Court of Appeals in one sentence, if you can?

25 MR. PUTZEL: It will be a long sentence, your  
2 Honor.

3 I think the major issue before the Court of  
4 Appeals insofar as Mr. Seigel is concerned is that he had  
5 just cause to refuse to answer the Court's question.

6 THE COURT: On the basis of an agreement?

7 MR. PUTZEL: The agreement and other constitutional

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
  
2  
3  
4  
5  
6

violations and on the basis that his testimony was discovered and thereafter tainted by unlawful wiretaps.

MR. BERENSON: If your Honor would like I have a copy of the brief we submitted if it might be helpful.

THE COURT: I notice is about an inch and a half thick, but I would like to have a copy, Professor, I really would.

MR. PUTZEL: The point insofar as Mr. Huss is concerned is solely the question concerning how Seigel was discovered and what he thereafter said to the government with respect to the identity of Mr. Huss as a co-conspirator in the Murco and Columbia firebombings.

Now, the Court has made a factual finding which is before the Court of Appeals concerning the discovery of Seigel.

But putting that to the side and assuming even just for the purpose of our argument, --

THE COURT: I want to say that the reason I admitted Sheldon Seigel to bail last week was because I viewed the issue, and it was only on this narrow ground, although perhaps I didn't express it at the time, the narrow ground that we had not heard from the CIA and that I regarded it as an issue that was not frivolous.

7 That was the basis and I now so state if I didn't do it  
8 then, that I admitted -- on which I admitted Seigel to bail.

9 As far as your client is concerned; that issue  
10 is no longer in the matter. I certainly said to Professor  
11 Dershowitz last week that I regarded his Watergate approach  
12 as frivolous, I used that word at that time, and I am  
13 somewhat at a loss to see what I regard as a substantial  
14 reason why I should not commit this young man.

15 MR. MILLER: I know you sincerely believe the  
16 religious issue is frivolous as stated and I believe that  
17 this is a viable issue and if we take this case up on  
18 appeal and it is subsequently held that in the Smilow  
19 decision this issue was not dealt with on the same ground  
20 and in fact is held that Mr. Huse is not in contempt of  
21 court, yet if he is held in civil contempt in jail pending  
22 final determination of this issue in this case, the case  
23 itself may be over, in which case the civil contempt would  
24 be dismissed anyway, really following the conclusion of  
25 the trial.

2 Now, in effect by remanding him at this time  
3 prior to appeal you are saying, in fact saying I have no  
4 right of appeal.

5 THE COURT: I am not saying that. I am saying  
6 I see no serious question on his appeal as in the case of



7 Professor Derzhewitz's client last week with respect to the  
8 CIA.

9 MR. JAFFE: With regard to the appeal under 28  
10 U.S.C. 126, that is the section that this witness has been  
11 held in contempt under, the Court of Appeals must under that  
12 section render a decision on appeal within 30 days.

13 MR. MILLER: It is my argument this case should  
14 be concluded prior to 30 days and within that 30-day period  
15 if the Court of Appeals in fact does rule in favor of Mr.  
16 Huss, he has no victory because he would be discharged any-  
17 way.

18 Furthermore, there is another consideration which  
19 I would like to put before this Court. Mr. Huss is  
20 presently a senior in high school, presently completing  
21 his studies and at this time, to make him, to remand him  
22 will in effect not allow him to take any final examinations,  
23 any regent examinations, in effect would be prohibiting him  
24 from graduating on time as against --

25 THE COURT: But the door to the prison lies in  
2 his mouth.

3 MR. MILLER: He is prohibited from testifying  
4 under religious law, he is not permitted with all due  
5 respect to the Court, and that is not at all an issue that



6 is adjudicated and which I feel are different from the  
7 issue raised in the Smilow decision, which to me deals  
8 with the Ten Commandments and which the Court in the Smilow  
9 decision dismissed with a footnote and I feel you cannot  
10 dismiss the Ten Commandments by a footnote and to incor-  
11 porate this witness prior to a final determination on this  
12 issue leaves him without a victory if in fact he is up-  
13 held.

14 THE COURT: Sir, one must very often do things  
15 that one does not enjoy doing when one is required and sworn  
16 to uphold the law.

17 I must say to you in conscience that I find your  
18 client in contempt, I find at least in my legal view his  
19 bases for appeal frivolous and, in these circumstances,  
20 the law requires me to order that he be committed to the  
21 custody of the Attorney General until such time as he  
22 answers the questions which he has refused to answer.

23 MR. SLOTNICK: Your Honor, on behalf of Cohen  
24 I object to that. I respectfully request that you  
25 allow at least at this stage of the proceeding a hearing,  
2 as Mr. Jaffe has so eloquently indicated to the Court,  
3 that the detective be called, the one individual who can  
4 testify whether the names or the presents were obtained  
5 through illegal means and respectfully request that the

6 Court commence that hearing.

7 THE COURT: His lawyer hasn't asked for that.

8 MR. SLOTNICK: I believe I have standing.

9 THE COURT: I don't.

10 MR. SLOTNICK: Therefore your Honor is cutting me  
11 off and asking me not to continue.

12 THE COURT: I am just saying I don't believe you  
13 have standing to request a hearing which affects the matter  
14 you are talking about. That is for his lawyer to decide  
15 and his lawyer to ask me to do.

16 All I am saying is in my view, Mr. Slotnick,  
17 you do not have standing to make that application.

18 MR. SLOTNICK: At any rate, that is the reason  
19 I raise the issue and I make the objection on behalf of the  
20 defendants, simply the fact that the alleged coercive effect  
21 upon Mr. Huss, if there be any, may inure to the detriment  
22 of my client as a result.

23 THE COURT: It may, Mr. Slotnick, but the very  
24 business of civil contempt means to have a coercive effect  
25 on the witness, that is what civil contempt is all about.

2 It says if you want to get out of jail, answer the questions,  
3 and when you do, out you come. It means to be coercive,  
4 that is what this law is about.

ONLY COPY AVAILABLE

5 MR. SLOTNICK: I am fully aware and that is for  
6 the life of this trial. When this trial ends the  
7 witness --

8 THE COURT: I say for the duration of this  
9 proceeding.

10 MR. SLOTNICK: However, it is my position --

11 THE COURT: He may very well and indeed the  
12 probability is that if he persists he will be then faced  
13 with a criminal contempt.

14 MR. SLOTNICK: That is a problem I cannot delve  
15 into.

16 THE COURT: I hope it will not be necessary.  
17 I hope this young man will take the opportunity which the  
18 law affords him for his own release based on testifying.  
19 I can't tell you how much I hope he does, but that decision  
20 rests with him, sir.

21 MR. SLOTNICK: That is for the witness's con-  
22 science. However --

23 THE COURT: Yes, it is.

24 MR. SLOTNICK: I make my application and I accept  
25 to the proceedings and except to the holding of this witness  
2 in contempt and I place it on the record for whatever purpose  
3 it may serve at this stage of the proceeding.

4 MR. JAFFE: Your Honor, may we have permission  
5 to recall this witness prior to the conclusion of these  
6 proceedings?

7 THE COURT: Of course you may recall him, but  
8 basically it is he who has got to decide whether or not  
9 he is going to open the doors for himself. I want my  
10 ruling perfectly clear if I may. The witness is held  
11 in civil contempt, of course, and is ordered to the custody  
12 of the Attorney General of the United States unless and  
13 until he answers the questions which he has so far refused  
14 to answer and that period of incarceration is to last the  
15 duration of this trial.

16 MR. MILLER: Your Honor, I respect your decision,  
17 but I would like to point out one factor I have touched on.  
18 This witness was served with a subpoena in January to  
19 appear at the trial which was scheduled to commence, I  
20 believe, February 5.

21 At that time he was in the middle of a school  
22 term and the burden upon him was not -- the fact remains  
23 we now have a set of circumstances four months later which  
24 true as you stated the key to opening the door is in his  
25 hands, but because of delays, procedural matters which  
2 were not strictly my client's happening, really, and the  
3 fact that he appeared back in February under the same

4 grounds would have refused --

5 THE COURT: The delays were necessary, the delays  
6 were occasioned by a hearing that took almost two weeks.  
7 I know there were delays.

8 MR. MILLER: I know there were delays --

9 THE COURT: Just a minute, please. There  
10 were delays by my writing a rather lengthy opinion dealing  
11 with the objections that were raised and delays occasioned  
12 by the disposition of other business of this Court. Yes,  
13 there have been delays.

14 MR. MILLER: Those delays have placed my client  
15 in a position where really it is imposing on him a burden  
16 far greater than the contempt burden. He is in a position  
17 where he is in effect prohibited from going to school,  
18 taking his final examinations, taking his regents examina-  
19 tions and graduating from school.

20 THE COURT: You are reciting all of the factors  
21 that I, believe it or not, find terribly painful, but you  
22 are not reciting anything that has to do with the law in  
23 this case.

24 MR. MILLER: You have already ruled, I know.

25 THE COURT: Yes.





of the teachings of my religion and cannot be recognized by an American court as a basis for not testifying. With all due respect to the decision of the Court of Appeals and of the honorable tribunal, I find that the cardinal precepts of my religion must take precedence in my mind. Therefore I respectfully decline to answer any questions on the religious principles stated in my prior declarations before this honorable tribunal.

THE COURT: I direct you to answer. I order you to answer.

THE WITNESS: Same declaration.

MR. STUPEL: Excuse me just a minute, Judge.

THE COURT: Believe this goes any further.

Mr. HESS, I want to tell you something: I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you.

I again want to advise you of that and I want to make other things abundantly clear to you, Mr. HESS.

One, I am going to ask the United States Attorney to comply with the provisions of Rule 423 and proceed against you for criminal contempt if you persist in refusing to answer.

power. I for one regard your refusal to answer as criminal contempt.

I want further to advise you, Mr. Huss, that for criminal contempt there is no limit upon the amount of punishment which can be imposed upon you for that crime.

Is that clear?

THE WITNESS: Yes, your Honor.

Q Mr. Huss, do you know an individual named Stuart Cohen?

A Same declination.

MR. JAFFE: Would your Honor direct the witness?

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Murray Elbogen?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Jeffrey Smilow?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Sheldon Seigel?

A Same declination.

THE COURT: I order you to answer.

ONLY COPY AVAILABLE



THE WITNESS: Same.

Q Do you know an individual named Jerome Zellerkraut?

THE COURT: Yes?

MR. ZWEIBON: Your Honor, I think we have gone --

THE COURT: I don't think so. Go ahead.

Q Do you know an individual named Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 25th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 26th of January, 1972 did you see Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court, and I want you to have no further say in this.

I now order you to answer.

THE WITNESS: Same declination.

Q Directing your attention, Mr. Huss, to the morning of January 26, 1972, would you tell the Court who you saw, that is, what persons you saw on that morning?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. NICHOLS: Excuse me, your Honor. The witness has made it clear in my mind that he will not answer. I see no purpose in this continuing.

THE COURT: Let me tell you what the purpose is. Someone has committed a dastardly, vicious, unforgivable, unforgettable crime. Someone is frustrating the administration of justice in a case that in my mind involves murder. People who deliberately do so will learn the power of the law even if there are those who have literally gotten away with murder.

Proceed.

Q Mr. Huss, on the morning of January 26, 1972 did you go in a motor vehicle with Sheldon Davis, with Jeffrey Smilow and Murray Elbogen and with Jerome Zellerkraut and drive in an automobile from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Had you prior to the morning of January 26, 1972 agreed with Sheldon Davis and Stuart Cohen that you and Jerome Zellerkraut would go to the offices of Sol Hurok?

A Same declination.

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled, same order. I order you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, did you on the morning of January 26 deliver any attache case along with Jerome Zellerkraut to the offices of Sol Hurok?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I again advise you that your continued refusal to answer these questions over my direction constitutes criminal contempt of court.

Go ahead.

Q Mr. Huss, prior to the morning of January 26, 1972 or on the morning of January 26, 1972 did you have any discussions with Sheldon Davis, Stuart Cohen, Sheldon Seigel, Jerome Zellerkraut, Harold P. Brown or Jeffrey Brown about



carrying an attache case to the offices of Hurok Concerts, Incorporated?

MR. SLOTHICK: I object to the form of the question.

THE COURT: Overruled.

Answer, please.

THE WITNESS: Same declination.

THE COURT: I direct you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, were you ever part of any plan to deliver any incendiary devices to either Hurok Concerts, Incorporated or Columbia Artists Management on the morning of January 26, 1972?

MR. SLOTHICK: I object to the form of the question.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause.)

THE COURT: I want the record to indicate at this point that it hasn't been shown that this individual

2 previously.

3 Are you aware of that, Mr. Huss?

4 THE WITNESS: Yes.

5 THE COURT: And you have been aware of that all  
6 morning, have you not?

7 THE WITNESS: Yes, your Honor.

8 MR. ZWIEDEN: If your Honor please, for the sake  
9 of the record I don't want to pop up everytime with this type  
10 of objection and --

11 THE COURT: You may rise every time you have  
12 an objection to make.

13 MR. ZWIEDEN: So that we will make it in duet.

14 THE COURT: What is on your mind?

15 MR. ZWIEDEN: The same things, the leading of the  
16 witness, the matter of form, the length of this type of  
17 interrogation.

18 THE COURT: Overruled.

19 Q Mr. Huss, on the morning of January 26, 1972  
20 did you leave an incendiary device contained in a black  
21 attache case in the offices of Sel Harek, Harek Concerts,  
22 Incorporated?

23 A Same question.

24 THE COURT: I order you to answer.

25 THE WITNESS: Same question.

ONLY COPY AVAILABLE

Q Mr. Huss, on the morning of January 26, 1972 at around 9:30 did you meet in Manhattan with Jerome Zellerkraut, Jeffrey Smilow and Murray Elbogen?

MR. SLOTHICK: I object to the form of the question as not being binding on my client.

THE COURT: Overruled.

MR. ZWISLOW: Same objection.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: At this time the government would ask the Court, pursuant to Rule 42B, to orally notify this witness that he is to be held in criminal contempt pursuant to Rule 42B and Sections 401 and 402 of Title 18, United States Code?

We would state to the Court that we are at this time ready to proceed forthwith with a trial for criminal contempt of the witness Richard Huss.

THE COURT: I want to tell you, Mr. Huss, as I have throughout your examination this morning, that your failure to answer the questions put to you constitutes in my judgment criminal contempt.

However, so far as the United States Attorney

ONLY COPY AVAILABLE



concerned, because of the seriousness of this criminal attempt, I think that the United States Attorney should proceed on papers as indicated in Rule 42 B, namely, that part "on application of the United States Attorney by an order to show cause or an order of arrest."

You have made the application and since you make the application I ask you to comply with Rule 42B and proceed by order to show cause or an order of arrest so that the order to show cause, to be perfectly frank with you, will specify in writing for this man what it is he is facing. Obviously this proceeding will be a jury proceeding.

MR. JAFFE: That is correct.

THE COURT: Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment, if this man is guilty, to six months, and therefore I want every letter observed. I want him proceeded against in writing. I want the case to proceed to a jury trial and I want the Judge, whoever he is, to have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that, but the law will make them pay.

MR. JAFFE: Your Honor, with regard to the fact if the government would ask that -- and we will comply with

Honor's direction to proceed on papers, but the  
Government would ask that since under Rule 42B notice can  
be given orally by the Judge in open court in the presence  
of the defendant, and he will be a defendant, being cited  
in criminal contempt.

THE COURT: I have so notified him, it seems to  
me several times.

If he has misunderstood me I so notify him now.

You will be a defendant in a criminal contempt  
proceeding. That is clear, isn't it, Mr. Huss?

THE WITNESS: Yes, it is.

MR. JAFFE: We would ask your Honor that bail  
be fixed for the defendant pursuant to that rule.

THE COURT: He isn't in custody yet. He hasn't  
been arrested on this charge.

MR. JAFFE: What we will ask, your Honor, is  
that he be arrested at this time. We will serve him with  
papers this afternoon. I believe under the rule, under  
Rule 42B, the oral notice is sufficient to cause the ar-  
rest and we will serve him with papers this afternoon.  
I ask at this time that he be placed under arrest and we  
that bail be fixed as the rule provides.

THE COURT: The marshal will take him into  
custody then on your complaint, I take it.



MR. JAFFE: That is correct, your Honor.

THE COURT: All right, I will hear you as to bail. I will hear you, Mr. Jaffe.

MR. JAFFE: Your Honor, excuse me just a moment.

MR. MILLER: With respect to bail, your Honor, I think Mr. Putzel will agree that in the past this witness even prior to being served with a subpoena has at all times cooperated with making his appearances on time. He has never at any time not cooperated with respect to making his appearances.

As a matter of fact, Mr. Putzel has commented to me in personal communications with respect to the witness' cooperation. Because of the witness' cooperation Mr. Putzel has, when the witness was scheduled to appear in court prior to his incarceration, waived the reporting date at the time of the subpoena. He says he will call me. He knows that I will get in touch with the witness and the witness will be there.

In view of the witness' continued presence in court I feel that he can be released in his own recognizance to prepare this matter.

THE COURT: Do you understand that he is facing punishment without limit?

MR. MILLER: I understand that.

ONLY COPY AVAILABLE

THE COURT: And I am to release him on his own recognizance?

MR. MILLER: He has at all times appeared. He has never failed to appear. He has appeared and cooperated with Mr. Putzel prior to being served with a subpoena.

THE COURT: I am not going to get into the number of people who have gone to Israel who have been connected with this case, but I am aware of them and I will see that bail is fixed in such an amount as to ensure that Mr. Huss is here to stand trial for criminal contempt.

MR. JAFFE: May I be heard, your Honor?

THE COURT: Yes.

MR. JAFFE: Your Honor is aware of one of the circumstances which we wanted to point out and we would like to stress to the Court.

We have at least three witnesses, who are essential witnesses to the government, who are not available to the government. I know that two of them are in Israel. One of those witnesses was served with a subpoena and failed to comply with the order, has not appeared in the United States.

Another one of those witnesses is now placed in Israel but is one step ahead of the people who are trying

to serve him.

In addition, Elbogen, who is another witness that the government sought to obtain, is nowhere to be found, at least to compel his attendance here in the court. That is one circumstance.

There has been a mysterious disappearance of witnesses to Israel and elsewhere in the United States so that they are unavailable to the government.

In addition, the circumstances of this particular defendant now are markedly different than they were when he was merely a witness. He faces, as your Honor has already pointed out, a sentence without limit if convicted for criminal contempt. He is involved or he is charged with being involved with obstructing any type of administration of justice now by refusing to give this court essential testimony bearing on an absolutely heinous crime.

In these types of circumstances, given the nature of the crime, given the propensity and the involvement of others to flee and not to appear, the government is compelled to ask for bail in the amount of \$50,000 cash or surety bond.

MR. MILLER: Your Honor, with respect to the government's request prior -- Mr. Jaffe stated that the situation of the witness and the circumstances under which

2 he appears have changed. Prior to the serving of a sub-  
3 poena it was made clear to him the potential consequences  
4 of his refusal to cooperate.

5 Nevertheless, prior to the serving of the sub-  
6 poena he was at that time theoretically capable of fleeing  
7 and going to Israel if he intended to do so. Despite that  
8 he made his appearances, did not depart prior to the service  
9 of the subpoena, voluntarily appeared at Mr. Putzel's  
10 offices for questioning at this time fully aware of the  
11 potential consequences which may arise.

12 Nevertheless he chose not to flee, not to disappear  
13 and he did cooperate.

14 I submit that the motion that Mr. Jaffe makes  
15 for \$50,000 bail would be excessive.

16 THE COURT: He has every incentive to flee now  
17 that he didn't have before. He is a defendant.

18 MR. PUTZEL: At that time he was aware of the  
19 possibility and it was made perfectly clear to him.

20 THE COURT: Now it is a reality. He is a  
21 defendant in a most serious criminal case.

22 Because of the reasons I have previously  
23 given -- I don't see any necessity for spreading them on  
24 the record again. He did not frustrate a case of spitting  
25 on the sidewalk. He has frustrated a case of murder,

NOTICE OF MOTION FOR DISCLOSURE AND TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA, :  
  
Plaintiff, :  
  
-against- :  
RICHARD RUSS and JEFFREY SMILOW, :  
  
Defendants. :  
-----x

NOTICE OF MOTION FOR  
DISCLOSURE AND TO DISMISS

SIR:

Please take notice that on the annexed affidavit of Eve Cary, sworn to the 2nd day of November, 1973, the undersigned will move this court at a motion term thereof to be held before the Hon. Thomas P. Griesa, United States, District Judge, at a time and place to be set by the Court, at the United States Courthouse, Foley Square, New York, New York, pursuant to Rules 12 and 16 of the Federal Rules of Criminal Procedure

- (a) to disclose statements of the defendants made to government personnel;
- (b) to dismiss the charges upon the ground that the requirement to testify violates the constitutional rights of defendants and that the federal contempt powers are unconstitutional;

and for such other and further relief as to the Court seems just and proper.



Dated: 2 November 1973

Yours, etc.

EVE Cary

PAUL G. CHEVIGNY

EVE CARY

Attorneys for Defendants

New York Civil Liberties Union

84 Fifth Avenue

New York, N.Y. 10011

TO: PAUL J. CURRAN  
United States Attorney  
Federal Courthouse  
Foley Square  
New York, New York 10007

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- :

AFFIDAVIT

RICHARD HUSS and JEFFREY SMILOW, :

Defendants. :

----- x

State of New York )  
: ss.:  
County of New York)

EVE CARY, being duly sworn, deposes and says:

1. I am an attorney with offices at 84 Fifth Avenue,  
and I am one of the attorneys for the defendants herein. I  
make this affidavit in support of their motion to disclose state-

ments and to dismiss the charges.


2. This is essentially a legal matter, as to which very few factual allegations here are relevant or necessary. On information and belief, government records and testimony of the defendants will show that defendants made statements to government interviewers in this case. Testimony now may subject one or more defendants to prosecution for previous statements, as set forth in the accompanying memorandum of law. The motion to dismiss will be partly based on this issue.

3. In addition, defendants contend that the total discretion with relation to sentencing afforded by the law of contempt, permitting an endless sentence, renders the contempt power unconstitutional as a denial of due process of law.

  
EVE CARY

Sworn to before me this

2nd day of November, 1973

  
NOTARY PUBLIC

BRUCE J. ENNIS  
Notary Public, State of New York  
No. 31-6191955  
Qualified in New York County  
Commission Expires March 30, 1974

# Spying Missions and 2 Wiretaps Laid to Ehrlichman by Officials

By SEYMOUR M. HERSH

Special to The New York Times

New York Times 6/6/73 p. 1

WASHINGTON June 5—John D. Ehrlichman, President Nixon's former chief domestic adviser, announced a series of espionage missions and at least two previously undisclosed illegal wiretaps beginning in 1969 that were carried out by an ad hoc White House intelligence group, officials knowledgeable about the Watergate investigation said today.

In addition, the officials said, detailed planning for a number of White House-ordered burglaries was authorized by Mr. Ehrlichman, although it could not be learned whether any such burglaries—including a planned foray into the Brook-

ings Institution here—actually took place.

Most of the operations were coordinated by John J. Caulfield and Anthony T. Ulasiewicz, two former New York City policemen who began working for the White House in early 1969, the officials said, including an investigation into the background of Mario Biaggi, who was defeated in yesterday's New York mayoral primary.

Mr. Biaggi, as a freshman Representative from the Bronx in 1969, bitterly criticized as "insulting" to Italian-Americans an early Nixon crime message to Congress calling for an at-

Continued on Page 35, Column 5

tack on organized crime.

In addition, Mr. Ehrlichman's and Mr. Caulfield's informal White House group—described by knowledgeable sources as a precursor of the 1971 "plumbers" operation set up by Mr. Nixon to investigate the Pentagon papers leak—also questioned a number of participants in and eyewitnesses to the massacre at My Lai in South Vietnam in late 1969 or early 1970 to determine if the first newspaper accounts of the atrocity were correct.

One Government investigator said that a full description of the White House group's work would be provided to the Senate Watergate committee by John W. Dean 3d, the former White House counsel, who is scheduled to testify next Wednesday, barring court intervention.

## Testimony by Caulfield

In his televised testimony last month before the Senate Watergate committee, Mr. Caulfield, a former undercover policeman in New York, gave a far from complete description of his initial assignment inside the White House.

"During the first three years," he said, "first on orders from Mr. Ehrlichman and later, in some instances, on orders from Mr. John Dean, Mr. Ulasiewicz, under my supervision, performed a variety of investigative functions, reporting the results of his findings to the White House through me. I do not fully recall all of the investigations performed in this fashion."

Officials said that, in addition to about 15 clandestine intelligence missions, Mr. Caulfield and Mr. Ulasiewicz were directly involved in the installation of a wiretap on telephone lines leading to the Georgetown residence of Joseph Kraft, the syndicated columnist.

A source who was closely involved said that the wiretap was installed in early 1969 at the express direction of Mr. Ehrlichman. "Caulfield didn't do it personally," he said, "but got someone else to look at it."

At one point before the installation of the wiretap, the source said: "Caulfield asked Ehrlichman why they [the White House] didn't go to the F.B.I. since he had been told to put it in for national security purposes."

He was told by Ehrlichman, "Well, the F.B.I.'s a sieve. Things get out that way."

A wiretap was installed and began to operate, the same source said, although Mr. Kraft was out of town at the time. Before the columnist returned, he said, Mr. Ehrlichman got in touch with Mr. Caulfield "and said to forget it; they had it another way."

The source said that Mr. Caulfield assumed that the White House had prevailed upon J. Edgar Hoover, then the director of the Federal Bureau of Investigation, to take over the bugging of Mr. Kraft.

Mr. Caulfield ordered his men to return to the Kraft residence and remove the wiretap, the source said, a high-risk op-

eration involving the use of a ladder outside the second floor of the home.

Mr. Caulfield knows of at least one other wiretap that was installed on Mr. Ehrlichman's orders outside the normal F.B.I. channels, the official source said. That wiretap involved someone "in the family," he added cryptically, in an apparent reference to someone in the Administration.

It could not be learned whether the Federal prosecutors in the Watergate case were planning to conduct a separate investigation into the allegations of illegal wiretapping.

Both the prosecutors and the Senate Watergate committee are known to have received full accounts of the ad hoc White House group's activities from Mr. Dean, Mr. Caulfield and Mr. Ulasiewicz.

One closely involved person said that the planned break-in at the Brookings Institution, a liberal Washington research group, was discussed sometime in 1971. Mr. Caulfield was told, the source said, that high White House officials "wanted some papers out of somebody's file." He did not know, he said, whose file was involved.

It has been widely reported that President Nixon personally authorized the wiretapping of 13 National Security Council and Pentagon aides as well as four newsmen in May, 1969, after what officials described as a serious news leak.

ONLY COPY AVAILABLE



There is some evidence that Mr. Caulfield's ad hoc group was supplanted, at least in some aspects, by the plumbers operation, which was organized in July, 1971.

In a civil suit deposition released today, Mr. Ehrlichman is quoted as commenting that in September, 1971, G. Gordon Liddy, the former member of the plumbers group who later led the Watergate break-in team, was initially introduced "as the new man in place of Caulfield."

And Mr. Caulfield, in his Senate testimony, has noted somewhat plaintively that "in the spring of 1971, I began to notice that, for some reason, the amount of investigation work handled by Ulasewicz through me had diminished."

One closely involved source said that one of the main functions of Mr. Ulasewicz, who had been hired through Mr. Caulfield after spending 20 years in police work, was to attempt to infiltrate large demonstrations in Washington. "Tony would just stand around with them and listen," the source said. "It was silly and they might just as well have had the local police do it."

It has been previously reported that Mr. Ulasewicz was hired by Mr. Ehrlichman after a clandestine meeting in mid-1969 at La Guardia Airport and paid in cash by Herbert W. Kalmbach, who was then President Nixon's personal attorney. The funds for Mr. Ulasewicz were reported to have been authorized by H. R. Haldeman, the former White House chief of staff.

Both Mr. Caulfield and Mr. Ulasewicz believed national prominence during the first of the Senate Watergate hearings last month when it was alleged that they had both participated in a White House-directed effort early this year to offer executive clemency to James W. McCord Jr., one of the Watergate conspirators, in return for his silence.

One knowledgeable official said that most of the Caulfield-Ulasewicz assignments "involved specific events that already happened." He added, "They were just checking out press reports to seek what else they could learn that wasn't in the newspapers—like My Lai."

"That's not illegal," the official declared.

Asked if Mr. Ehrlichman was

directing the White House intelligence operation, the official said: "Oh God, yes. Caulfield wasn't thinking these things up."

The only surveillance project that was initiated by the two men was the investigation into the background of Mr. Biaggi, their former colleague on the New York police force, the official said, although that effort also received White House sanction.

Mr. Biaggi's sharp attacks on the Presidential crime message began in early May, 1970. In one news conference, Mr. Biaggi said that he had been troubled by Mr. Nixon's message in which he sought "out Italian-Americans for undeserved notoriety while there are organizations in existence who openly exhort violence and whose acts border on treason"—an apparent reference to racial antiwar groups.

#### 5 Other Inquiries

The source said that Mr. Caulfield and Mr. Ulasewicz both suspected that Mr. Biaggi had some connections to organized crime, a suspicion they apparently could not confirm with their clandestine research.

The two men have been publicly linked to at least five other undercover investigations in 1969 and 1970 with obvious political overtones.

These included research into the Chapin-Riddick incident involving Senator Edward M. Kennedy, Democrat of Massachusetts, in 1969; a potentially embarrassing investigation of Representative Carl Albert, Democrat of Oklahoma, the House Speaker, possible financial links between Senator Edmund S. Muskie, Democrat of Maine, and some corporations with polluting problems; the financing of Senator Hubert H. Humphrey's 1968 campaign for the Presidency, and rumors that the brother of a leading Democrat might have been involved in a homosexual incident.

In addition, Mr. Caulfield and Mr. Ulasewicz also reportedly investigated the alleged harassment of Mrs. David Eisenhower by a Florida school teacher. Mrs. Eisenhower is President Nixon's younger daughter, Julie.

Mr. Ulasewicz is now living in Hadley, N. Y. Mr. Caulfield was dismissed last month from his post as assistant director of the Treasury Department's Bureau of Alcohol, Tobacco and firearms.

#### Halperin at Brookings

In late 1969 Morton H. Halperin, then a member of the council staff, resigned and became associated with Brookings, a fact which he still maintains. Mr. Halperin has also been associated with Dr. Daniel Ellsberg, whose Federal trial on charges stemming from his copying and releasing of the Pentagon papers recently ended with the judge dismissing the case because of the misconduct of the Government. The papers were classified Government documents about the origins of the Vietnam war.

(1a)

NOTICE OF MOTION FOR DISCLOSURE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- :

NOTICE OF MOTION

RICHARD HUSS and JEFFREY SMILOW, :

Defendants. :

-----x

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavits of Paul G. Chevigny, sworn to the 2nd day of November, 1973, of Richard Huss, sworn to the 31st day of October 1973 and of Jeffrey Smilow, sworn to the 1st day of November, 1973, the charges and all the proceedings heretofore had herein and in the cause of United States v. Cohen and Davis, 72 Cr. 778, the undersigned will move this Court at a motion term thereof to be held before the Hon. Thomas P. Griesa, U.S.D.J. at a time and place to be set by the Court, at the United States Courthouse, Foley Square, New York, New York, pursuant to the Federal Rules of Criminal Procedure, Rule 16, the First, Fourth, Fifth and Sixth Amendments to the United States Constitution, and Title 18, U.S.C. Sections 2510-20 and 3504 for an order compelling the

United States to disclose to defendants:

(1) Any and all actual voice records, tapes, mechanical or electronic recordings, and any and all logs, records, memoranda, letters and airtels, of any wiretapping, bugging, electronic or other similar surveillance,

(a) of any wire or oral communications to which the defendants were parties;

(b) of any wire or oral communications at the premises of the defendants;

(c) of any wire or oral communications at any place in which the defendants had an "interest" at the time of the surveillance; "interest" meaning any property right in the place or any other nexus of use, access, political association and reasonable expectation of privacy; \*

(d) of ~~any~~ wire or oral communications placed under surveillance for the purpose, in whole or in part, in gathering evidence or leads against the defendants,

(e) of any wire or oral communications of members of the Jewish Defense League;

(f) of any wire or oral communications at any place

---

\*Defendants have annexed hereto as Exhibit A a list of addresses and telephone numbers at which they and the other persons referred to in paragraph (2) have had an expectation of privacy in communications in order to aid the Government in searching for the materials sought by this motion. The list is not to be considered exhaustive of such places since it is the responsibility of the Government to make the necessary investigation.

at which the defendants were present at the time of the surveillance;

(g) of any wire or oral communications in which any party to same is unidentified;

(h) of any wire or oral communications in which the defendants are named or otherwise referred to.

(2) Any and all actual voice records, etc. and any and all logs, etc. of any wiretapping, bugging, electronic or other similar surveillance of any wire or oral communications:

(a) to which any attorney for the defendants, his agents or employees was a party;

(b) to which co-counsel of defendants' attorneys, and their agents and employees were party;

(c) any conversation at which any such persons were present; and

(d) at the homes or offices of any such person.

(3) Any and all logs, records, memoranda, letters, and airtels of any surveillance of wire or oral communication such as are described in (1) and (2) supra, which surveillance revealed the existence of said conversation but not necessarily the contents.

(4) The demands for disclosure (1)-(3), supra, embrace surveillance undertaken not only by the United States, its agents and employees, but by any governmental agency--state or local--and by any private person or corporation; and further embrace any

surveillance of wire or oral communication to which a party to that communication allegedly "consented".

(5) For any surveillance as described in (1)-(4), supra, for which there are no logs, memoranda, letters, records, or air-tels, the names and business addresses of the persons who conducted said surveillance or who have knowledge of said surveillance.

(6) For any surveillance requested (1)-(5), supra, which this Court might deny the demand for the logs, memoranda, records or airtels of same, the existence and circumstances of same; "circumstances" is meant to include date and place of the surveillance, who was present at said place, who conducted said surveillance, the manner in which it was conducted and all other relevant facts.

(7) The demands made supra seek not only disclosure of surveillance presently known to the government but that which in the exercise of due diligence may become known thereto.

(8) Defendants further demand all applications, affidavits, memoranda and other papers submitted in support of applications for executive, administrative or judicial approval of such surveillance as described supra (paragraphs (1)-(7) and all administrative, judicial and executive orders, opinions and decisions responsive thereto or relating to items (1)-(7).

(9) Defendants further demand disclosure of whether

and to what extent representatives of the White House Staff, including the so-called Intelligence Evaluation Committee and its staff, comprised of representatives of the White House, CIA, FBI, NSA, Departments of Justice, Treasury and Defense Departments, and the Secret Service, or any other Federal, State or local government agencies, participated in any activities with respect to the preparation or investigation of the subject matter of this case which activities were unauthorized by any court, consisting of burglary, acts of sabotage, mail searches, electronic surveillance devices, provacateurism, breaking and entering, or any and all other espionage tactics used against the Defendants herein, or in the preparation of the indictment herein.

(10) Whether and to what extent employees or agents of the White House, including the above-named Intelligence Evaluation Committee, its members and representatives described above, and/or the so-called White House Special Investigation Unit designated as the "Plumbers" and any other agencies of government or private persons acting on behalf of agencies of government participated in any or all of the espionage activities described above against these defendants, the Jewish Defense League and members of it, and/or the attorneys for defendants and for the Jewish Defense League and for other members of the Jewish Defense League.

(11) Whether and to what extent files which may have affected the Defendants or the prosecution herein have been lost

or destroyed.

(12) Defendants further request disclosure of all airtels, letters, records, memoranda or other written material which incorporates or makes reference to, either explicitly or implicitly, the product of any surveillance as described (1) through (11), supra, or makes reference, either explicitly or implicitly, to any surveillance as described (1) through (11), supra.

(13) Defendants further respectfully move this Court for an Order of continuing disclosure of the items sought supra under Federal Rule of Criminal Procedure 16(g) and any applicable local rule or rules.

(14) Defendants further request an evidentiary hearing prior to trial to determine:

- (a) whether the government has fully complied with the demands made, supra (said hearing is requested for the earliest possible date);
- (b) the standing of the defendants to raise the issue of the legality of any said surveillance;
- (c) the legality of any said surveillance;
- (d) the extent to which said surveillance resulted in the discovery of defendants as witnesses in the case of United States v. Cohen and Davis and tainted the evidence that would have formed the basis of examination of defendants by the government at the trials of Cohen and Davis.



(e) The purpose of such surveillance.

(15) Defendants further move that, in the event said hearing should disclose that their identities as witnesses in United States v. Cohen and Davis were discovered as a result of illegal surveillance or that the evidence on which they were to be questioned in that case was tainted by illegal surveillance, that the charge herein of criminal contempt against defendants be dismissed.

The grounds for this motion, as more particularly set forth in the accompanying affidavit and memorandum of law are that only through effective pre-trial adversary inquiry can the defendant be protected in his right to be free of the effects of unlawful wiretapping, bugging electronic and other similar surveillance, and all other illegal actions by the government.

(16) Defendants further request that this Court issue a protective order directing that the nature and contents of the aforesiad requested materials:

(1) may be disseminated only to counsel of record for defendant; and

(2) may not be disclosed except with the express written permission of said defendant to any other person, natural or artificial, public or private, whatsoever.

(17) Defendants further request such other and further relief as seems just and proper to this court.



(102)

Yours, etc.,

Dated: November 2, 1973

EVE CARL

PAUL G. CHEVIGNY

EVE CARL

Attorneys for Defendants

New York Civil Liberties Union

84 Fifth Avenue

New York, N.Y. 10011

TO: PAUL J. CURREN  
United States Attorney  
Federal Courthouse  
Foley Square  
New York, N.Y. 10007

PAUL G. CHEVIGNY, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bar of this Court, with offices at 84 Fifth Avenue, New York, New York, and I am one of the attorneys for the defendants herein. I make this affidavit in support of the defendants' motion for disclosure and to suppress and dismiss the charges.

2. Some of the previous history of the surveillance in this case, as disclosed at earlier hearings, is set forth in the opinion of the Court of Appeals in United States v. Huss, 482 F.2d 38 (2nd Cir 1973). In approximate chronological order, drawn from the opinion, the events are as follows:

Date	Description
October, 1970	Commencement of unlawful wiretap of Jewish Defense League (JDL) office telephone;
April 22, 1971	<u>Amtorg</u> bombing;
June 3, 1971	Physical surveillance of Sheldon Siegel begins;
June 29, 1971	S. Siegel indicted, N.Y. Sup. Ct. for possession of explosives;
July 2, 1971	End of unlawful tap of JDL office telephone;
August 9, 1971	S. Siegel agrees to become informer;
September 8, 1971	Indictment in Amtorg bombing EDNY. S. Siegel is indicted, but continues as informer;
September, 1971	S. Siegel is promised immunity;
December 15, 1971	Commencement of unlawful wiretap of S. Siegel home telephone;
January 26, 1972	Smoke bomb in offices of S. Hurok (subject of trial underlying this case);
March 1, 1972	End of unlawful wiretap of S. Siegel home telephone.

There are on information and belief no examples of lawful electronic surveillance. This apparent patchwork of wiretapping and police investigation, punctuated by acts of violence, suggests a number of questions. Defendants assert that the sequence of facts, together with the conclusions drawn by the Circuit Court, and recent developments in the law demonstrate:

(a) Defendants have standing to assert a privilege for unlawful surveillance of the Jewish Defense League because it was directed against them, whether or not they were parties to conversations;

(b) Defendants have standing to assert a privilege for unlawful surveillance of Sheldon Siegel, because it was directed against them;

(c) It is likely that there are surveillances not yet revealed in previous proceedings, as to which defendants have standing, including surveillance of the JDL and its members.

A. Standing Of Defendants For Surveillance Of Siegel

3. The admission by the government of a tap on Sheldon Siegel's telephone from December, 1971 to March, 1972, long after Siegel was made into an informer and had even been promised immunity, suggests one thing very clearly: the tap was not primarily directed against Sheldon Siegel. The government was hoping to hear Siegel's conversation with other members of the JDL, and thereby obtain evidence against them, or those they mentioned. Even if it is assumed that the tap was a check on Siegel's veracity it is still true that it was directed against

persons other than Siegel, members of JDL expected to call in and presumably make statements which would verify or contradict his information. It is significant that apart from the JDL wiretap which ended before the Amterg bombing governmental officials established and admitted to an unlawful wiretap only of an informer, who was an integral member of a tightly organized political group, other members of which were suspected or accused of conspiratorial crimes with the informer. Officials did not admit to taps on other members, who were not informers. The reason? The authorities believed that the other members of the organization would not have standing to assert the invasion of Siegel's privacy, and Siegel would have no reason to assert it.\* The point here is that the surveillance was directed at persons other than the informer whose telephone was tapped - persons in the same organization who might be identified as callers, or through conversations. It is for this reason that defendants urge the court to determine the purpose of the wiretaps. If there is dispute about the purpose, an evidentiary hearing should be held.

\*It is true that Sheldon Siegel did have occasion to assert his standing when he became a prospective witness in the Hurok case, but at the time the surveillance was begun (December, 1971), several factors excluded that from official consideration: (a) the government presumably in December, 1971, had no reason to suppose that there ever would be a "Hurok" case, in January, 1972; (b) the right of a witness to assert his privilege was not generally recognized before Gelbard v. United States, 408 U.S. 41 (June 26, 1972).

### B. Likelihood Of Further Surveillance

4. Defendants do not mean to assert by the foregoing paragraphs that they accept the representations made in earlier proceedings that the only unlawful surveillance was that on the JDL telephone up through March, 1971, and the tap on Siegel's telephone in the winter of 1971-72. We do mean to assert that those taps are admitted to just because they either do not seem on the surface to help the defendants, or because some officials believed that the defendants would not have standing to challenge them. We reiterate that it is improbable that there were no taps on JDL telephones, once the Amtorg bombing had occurred. Amtorg, on information and belief was a Russian trading agency. As late as January 23, 1973, then Attorney General Kleindienst asserted in an affidavit filed in United States v. Stuart Cohen et al (the Hurok case), that the surveillance was a matter of foreign security, and therefore exempt from the strictures of United States v. United States District Court, 407 U.S. 297 (June 19, 1972).

The same assertion was made as late as 1973 by the government in the civil action in the District of Columbia based on the same JDL tap (October, 1970 - March, 1971). Zweibon et al v. Mitchell 71 Civ. 2025 (DDC). If foreign security was the purpose of taps on JDL offices and/or members, and it was thought to be exempt from the warrant requirement, there would seem to have been an a fortiori case after the Amtorg bombing.

5. The tap on the JDL office telephone was instituted in October, 1970. If the authorities were willing to undertake

such unlawful surveillance, it strains credulity to imagine that all such sources were suddenly ended in the middle of the Amtorg investigation, and before any informer was found.

6. One extraordinary fact, not emphasized by the Court of Appeals, is that Det. Santo Parola, Sheldon Siegel's handler, was heard on Sheldon Siegel's own tapes of conversations, speaking of the source of information, saying, "It's done on wiretaps" (482 F.2d at 49). Det Parola used the plural instead of "It's done on a wiretap" This may of course be mere loose phraseology, but it clearly suggests more than one wiretap. A second point is that the logs submitted by the government apparently disclosed nothing which would have led to Siegel either as a suspect or an informer. Nevertheless, the Court of Appeals assumed, in order to reach its decision reversing the conviction of Siegel, that there was such information, or at least that the implication raised by the words of Det. Parola that there was such information was not rebutted. That implication remains open; we have not yet seen a tape or a log which would have produced such information.

7. It is just as difficult to believe that there were no electronic surveillances (even with a warrant) on any offices or members of the JDL after the Hurok bombing, apart from the

wiretap on Sheldon Siegel's home telephone. Unless in fact that wiretap revealed everything the government needed to know, and it apparently did not, there was every reason to look elsewhere than to Siegel alone for information.

8. Recent history has shown that circumstances make it extremely difficult for the government to make an unassailable assertion that there is no unlawful surveillance, or that records found of such surveillance are in fact complete. The reports now contain a number of cases in which surveillance has been found after assertions that there has been none. One of the leading cases concerns a previous stage in this litigation. United States v. Smilow, 409 U.S. 944 (1972); 472 F.2d 1193 (2nd Cir. 1972). There it appeared, at the Supreme Court level, that the government actually may have had some surveillance of Mr. Smilow, previously undetected because it was under the name "Jeff". This case and other cases, cited in the accompanying memorandum of law, reveal that the government is not always able to retrieve records of all its surveillance, for a number of reasons. These may be simply summarized as follows:

(a) Government listeners often do not know the names of callers. The events in the previous Smilow case arose in this way. This means that a call may come into a line which is illegally tapped, or words be spoken that are bugged, and may yield information, but it may not be easily traceable to the person who made it.

(b) The government does not know which logs or tapes of surveillance to canvass. Unexpected persons may call in on lines which are tapped in connection with entirely separate matters. This is especially important in connection with calls to and from attorneys.

(c) Sources are difficult to trace because records are often kept solely by the name of the person who owns the telephone, and not by the names of callers.

(d) Central record-keeping about wiretaps, especially illegal ones, is very sketchy. Facts are concealed as between agencies, and even within agencies.

(e) Personnel sometimes do not know the source of items in a file, especially if they are unlawfully obtained.

(f) Material revealed in tapes or airtels is sometimes not included in logs.

Accounts of difficulties encountered by attorneys in attempting to make a final determination of taint are set forth in copies of affidavits of Michael Tigar, Esq., dated April 11, 1971, in the record in the case of United States v. Ahmad, M.D. Pa. Index #14386, and of William Bender, Esq., dated March 5, 1973, in the case of United States v. William Ayers, E.D. Mich. Index #48104. Copies are attached hereto.

9. The revelations of the Watergate investigations



have raised still other problems of surveillance. On June 7, 1973, the New York Times printed the text of a plan for intelligence-gathering. (See attached) It is not only related to internal but to so-called foreign security. The text states, in part, under B:

ELECTRONIC SURVEILLANCE AND PENETRATIONS.  
RECOMMENDATION:

"Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

Also, present procedures should be changed to permit intensification of coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community.

It appears, furthermore, that despite protestations to the contrary, part or all of the plan was put into effect. Sen. Lowell Weicker charged that part of it was used, see New York Times June 11, 1973 (attached). The plan itself being applicable to problems of "foreign" as well as domestic security, and the JDL presenting serious problems in relation to both areas, the plan was fully as applicable to the JDL as to other organizations.

10. The Watergate revelations make it more clear than ever that a government agency cannot rely on the bland assurances of others concerning the existence of unlawful surveillance. Thus an article in Newsweek for June 11, 1973, summarizes some of

the conclusions. It appears that the plan of the Interagency Committee on Intelligence was put into operation, despite disclaimers. More important, certain wiretaps not known to other persons in government were kept secret. Similarly, The New York Times for July 10, 1973 reports that material related to the "plumbers" group was concealed even from FBI agents by high government officials. Again, the New York Times for June 6 reported other "untraceable" wiretaps attributed to John D. Ehrlichman (see attached).

11. These issues are relevant to surveillance problems of the JDL, for several reasons which appear on the surface of the facts in the case:

(a) Information concerning the unlawful wiretaps emanated from the Internal Security Division of the Justice Department, which was one center also of the work of the Interagency Committee on Intelligence.

(b) The wiretap of Sheldon Siegel's telephone was approved at a high level and in such a specialized manner that it is possible for other surveillance to have been approved via similar "non-routine" manner, making detection very difficult.

(c) The government itself turned up references to Jeffrey Smilow in an earlier case when it had not previously been able to find them.

12. The problems of proof raised in the foregoing paragraphs are not applicable solely to "left-wing" organizations, in some manner which would exclude the JDL. In the first place, as previously noted, there was admitted unlawful governmental activity against the JDL. Moreover, clandestine activities were conducted by the government with relation to right-wing organizations for many reasons. The New York Times for June 24, 1973, records one such infiltration. (see attached). It is now well-known that Sheldon Siegel was a government informer at the time his home telephone was unlawfully tapped, and before and after that time. It is apparent that the admitted tap was used as an avenue to other members of the organization.

C. Standing of Defendants With Relation To Existing and/or Undetected Surveillance

13. The attached affidavits of Jeffrey Smilow and Richard Huss detail their relationships with the JDL, Sheldon Siegel, and other members of the organization. On information and belief, these will show the associational interest in all information obtained by the government. This is peculiarly a case in which the interests of the defendants, JDL and Sheldon Siegel cannot be compartmentalized. The interests of defendants

in all such surveillance should be recognized by this court.

Sworn to before me this

2<sup>nd</sup> day of November, 1973

Paul G. Chevigny  
PAUL G. CHEVIGNY

Eve Cary  
NOTARY PUBLIC

Notary Public  
Commission Expires 1977

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

RICHARD HUSS, being duly sworn, deposes and says:

1. I reside at 5 Staten Island Blvd., Staten Island, New York.

2. I have been a member of the Jewish Defense League since November, 1970.

3. The purpose of the Jewish Defense League is to help Jews. It does this in a number of different ways. We seek to put pressure on the American government to use its influence on other governments to cease anti-Semitic policies and persecution of Jews. We do this through demonstrations, picketing, rallies, sit-ins etc. We also have organized poverty programs for Jews and have attempted to see that existing programs met the needs of poor Jews. We have been involved on school boards and election campaigns. We have had an excellent education program including Jewish history, physical education and Hebrew language classes. We have sought to affirm our Jewish identity and instill pride in Jews of their religious and cultural heritage.

4. The JDL is divided into two parts: the adult movement and the youth movement. I was a member of the youth movement which consisted of members under the age of 25 and members who were still in school. Adult members were in charge of raising money and making policy, while the youth movement members carried

out most of the organizations activities.

5. During my first year of membership I occasionally visited and telephoned JDL headquarters in Manhattan. Most of my work was done in Staten Island where I was an active member. I went to many demonstrations during this period. In the fall of 1971 I was appointed Staten Island coordinator for the JDL. In this capacity I tried to increase membership in the organization and sometimes gave talks about the JDL to temple groups. I also attended weekly administrative board meetings of all of the New York area co-ordinators and other JDL officials such as director of publicity, director of activities etc. to report on my work. I worked approximately 10 hours per week on JDL activities. In approximately March of 1972 I was chosen to be director of activities of the JDL. At that point I was given my own office at JDL headquarters where I worked from three to four hours each weekday and a full day on Sundays. I occasionally spent nights in the JDL office. I was sometimes alone in the office or with only one other person.

6. Much of my work at all times consisted of telephoning. Often we would have to telephone the entire JDL membership which we did instead of writing to them to inform them of an activity to take place immediately. In the Brooklyn headquarters at 4002 New Utrecht Avenue there were three telephones

for youth movement workers, two for receptionists, and approximately four for the adult movement. We all used all of the telephones. No one had a private line. I only called out on Brooklyn headquarters telephones, but I did telephone to the New York headquarters when they were in Manhattan.

7. My lawyers in connection with this matter have been Bertram Zweibon, Arthur Miller and Robert Persky. I have talked to all of them on the telephone. I have been to Mr. Zweibon's office.

8. At different times I have telephoned every member of the JDL who belonged to the organization at the same time I was. I am searching now for additional telephone numbers that I called and will submit them when my list is complete.

Sworn to before me this

RICHARD HUSS

1st day of November, 1973

NOTARY PUBLIC



ONLY COPY AVAILABLE

123

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :  
 :  
 vs. : Indictment No. 48104  
 WILLIAM AYERS, et al., :  
 :  
 Defendants. :  
 :  
 \_\_\_\_\_ :

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF DEFENDANTS'  
MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE,  
FOR A PRE-TRIAL HEARING TO SUPPRESS EVIDENCE,  
AND TO DISMISS THE INDICTMENT.

State of New Jersey:

ss.

County of Essex. :

William J. Bender, being duly sworn, deposes and  
says:

1. I am making this affidavit in support of the  
defendants' motion to disclose electronic surveillance, and  
to inform the Court of certain facts which demonstrate the  
need for an evidentiary hearing on said motion.

2. In my experience as a defense counsel in  
United States v. Ahmad, M.D.Pa., No. 14,950, a case involving  
illegal governmental electronic surveillance, I have become  
familiar with techniques of the F.B.I. in conducting such  
surveillance, and with the problems of attempting to discover  
the extent of surveillance of a given defendant, the extent  
of surveillance used to investigate the case, and of devising  
an adequate court procedure to ascertain whether the government  
has fully complied with its legal duty to disclose all illegal  
taps to which a defendant has standing to object.

3. The government in Ahmad, "admitted to what ... [it] believe[d] are probably conversations of Sister Elizabeth McAlister, one of the defendants in this case," said conversations having been overheard in a "national security" electronic surveillance authorized by the Attorney General of the United States. (Hearing of May 24, 1971, pp. 56-57). The government steadfastly maintained from the outset that the overhearing of Sister McAlister was inadvertant, having nothing to do with furthering the prosecution of its case and having no relationship to trial evidence. (Id. 78). The government also adamantly asserted in the early stages of this case that the logs of the two alleged McAlister conversations were all that the defendants were entitled to or that existed. The government unequivocally informed the court that it had "searched the investigative agencies of the federal government" (Id. 58); "searched our files" as "to any surveillance to our knowledge conducted by state or local law enforcement agencies or private persons," (Id. 66), and as to those places wherein the defendants claimed on expectation of privacy in their moving papers "[i]f those people had an expectation of privacy in those premises and if they have ever made a phone call from those places, and if the surveillance which the defendants allege occurred did occur, then the records of the Department of Justice we searched would have disclosed that fact. They have not." (Id. 86A).

4. The government, however, consistently attempted to retain for itself the disposition of the question of whether the defendants had standing to compel disclosure of electronic surveillance that may have occurred at places wherein defendants asserted an expectation of privacy, as set forth in their moving papers (Id. 58, 59). The Deputy Assistant Attorney General claimed, "that the interest of ... [the] court and the interest of justice do not require us to go through an extensive search of our records on the basis of a totally unsupported claim of an expectation of privacy." (Id. 64).

5. In a post-trial "taint" hearing, the government, in response to defendants' renewed motion for full disclosure of electronic surveillance, again unequivocally denied any additional electronic surveillance to which the convicted defendants had standing to object. (See Hearing of May 1, 1972, pp. 70-73). After turning over the logs of the two alleged conversations of Sister McAlister, the government produced Agent Mason Smith of the Philadelphia F.B.I. office and Agent Gary Watt of the Washington, D.C. F.B.I. office to testify at the taint hearing.

6. The government's earlier representations, that whatever illegal electronic surveillance (of the so called

"national security" variety) it may have conducted was only for intelligence data gathering, were promptly contradicted. F.B.I. Agent Smith, who initiated the request for the surveillance in question (Hearing of May 2, 1972, partial transcript p. 31), and then supervised the surveillance operation (Id. 36), testified in direct opposition to the prior representations of the government attorneys; the surveillance was conducted to gather evidence to further the prosecution in this case (Id. 24, 45, 47) See ¶ 3, supra).

7. The government's representations, that it has made a bona fide exhaustive effort in searching its wiretap logs to ensure full disclosure of all illegal wiretaps for which defendants have standing, should not be accepted by this Court; in view of the inadequacy of the government's prior record of inadequate searching techniques, a full hearing on the sufficiency of the search is necessary. The determination of the participation of Sister McAlister on the calls was surmised by the government by reference to the telephone numbers that were called by the subject of the surveillance, (Id. 12), namely the number of the convent where Sister McAlister then resided along with other nuns. However, no effort was made to identify the voice of any person calling into the tapped location during the course of the surveillance or afterward. (Id. 14). Unless a full name was mentioned in the course of a tapped conversation, the only means of identification was by way of the name of the phone service subscriber to whom the intercepted call was made (Id. 14). Agent Smith admitted that often in phone conversations, a full name is not used,

as was the case with the two logs before the court, where only a first name, to wit, "Liz" was used. (Id. 15). The agent also recognized the possibility that names are not always used (Id. 18), making identification by names impossible. The mechanical devices which recorded the phone numbers of outgoing calls from the tapped location could not register the phone numbers of incoming calls, so incoming calls could not be similarly identified (Id. 33). The only way that Sister McAlister or anyone else calling into the tapped location could be identified, would be by the use of a name. (Id. 33). Smith could not answer with certainty whether there were any calls which could not or had not been identified. (Id. 33-34). Because the two logs were not positively identified as containing Sister McAlister's voice, no formal record of her conversations having been overheard was made. (Id. 37). The agent's testimony as to his indices check for other possible overheard conversations indicated his inability to identify persons calling the tapped location who may have failed to give their full name (Id. 50).

8. The inadequacy of the government's central record-keeping system of wiretap logs further underscores the need for a full hearing on the sufficiency of the government's search for and disclosure of illegal wiretaps. Agent Watt, a supervisor of the F.B.I.'s domestic intelligence division, supervised the general search of records (Id. 54), pursuant to a letter from the Justice Department attorneys (Id. 57), in order to disclose any electronic surveillance as to

defendants, their attorneys, or any unindicted coconspirators. The means for ascertaining the existence of surveillance is an F.B.I. index comprised of an alphabetical list of names (Id. 57). Index cards would indicate that a telephone belonging to the person listed, was tapped, that someone was overheard who called into the installation, "the date the installation was installed might be also included in the file, and the location ... possibly." (Id. 58). Unidentified callers who may only use first names who call into a tapped installation would not be reflected in the index (Id. 59). Agent Watt was not certain if the fact of the existence of unidentified callers on the tap would be listed in some manner. No index is kept by investigating subject, by name of case, or by place. The only way to determine whether someone has been overheard is to search for a name alphabetically in an index file (Id. 61). Watt knew of no other method within the department of determining whether or not a particular individual has been overheard (Id. 61-62). The only way to determine if a residence had been overheard would be if the residence was identified with a name in the index. (Id. 65). The defendants' submission to the government of a list of places, wherein they had an expectation of privacy, to assist the government in searching its files, was a worthless exercise because, "if his name wasn't mentioned, his name wouldn't be included in the indexes [sic]." (Id. 67). Contrary to the earlier representations of the government attorneys (See Point

III, supra.), Agent Watt testified that only the F.B.I. index was checked and other investigatory agencies of the federal government were not. (Id. 73-74). Where several people shared a residence with a tapped phone, only the name of the telephone subscriber would appear on the index, not the other users of the phone. No search was made for an item "Religious Sacred Heart of Mary," the residence of Sister McAlister, one of the places listed in defendants' motion. (Id. 77).

9. Because of the past history of F.B.I. Agents evidencing a marked reluctance to cooperate in the facilitation of a meaningful taint hearing, this Court must redouble its efforts to ensure a full hearing on all relevant matters pertaining to the sufficiency of the government's efforts of disclosure. The testimony of Agents Smith and Watt, and of Special Agent Charles Dunham and Special Agent Supervisor William Anderson in the subsequent hearing of May 15, 1972, included generally vague and illusive answers and a noteworthy inability to recall essential details of the investigatory processes underlying the case.

10. Agent Smith testified that, "[t]here would be nothing to prevent [Agent Durham] (the case agent) ... from looking at ... this surveillance material." Durham headed the investigation of the case. (Hearing of May 2, 1972, pp.35-36). Smith did not know who may have received the tapes or who would know if they were seen at all. (Id. 40,48). No record



was kept as to who received the logs or who heard the tapes (Id. 37-38).

11. Agent Watt was "not absolutely certain" that he did not furnish information from electronic surveillance files during the investigation (Id. 80). Watt did not check his files prior to testifying to determine whether evidentiary leads had been sent out (Id. 81).

12. Agent Durham, who worked on the case investigation, reported to Anderson who in turn reported to Agent Jamison, the Special Agent in charge (hearing of May 15, 1972, p. 22). Durham, as "case agent" was "to correlate, assemble, possibly send out leads, investigate leads and then prepare reports in this matter." (Id. 25). Anderson saw the reports before they were sent to the Justice Department (Id. 25). The overall case file included a subfile designated "June File" which was understood by Durham to be "the sub-section wherein all matters pertaining to this hearing would have been routed." (Id. 33). Durham did not know where the particular "June File" was kept (Id. 35). He did know that the file had been opened and assigned to Smith (Id. 37) and perhaps Smith may have seen it (Id. 36). In twenty years of experience as an F.B.I. agent, this was Durham's only contact with a "June File" (Id. 37). He saw "a few communications that were very early, at its inception, placed in that file," (Id. 38) but he did not remember what they were except they concerned the authorization for the surveillance (Id. 39). Durham's function was to receive all matters coming into the file and to control

the filing and the sending out of leads (Id. 39-41). He knew who the subject matter of the surveillance was (Id. 46). He was to send leads from Philadelphia to New York during the course of the surveillance operation (Id. 60). He could not recall how many leads he sent to New York, but he did recall performing this function (Id. 60). He thought he could reconstruct which leads were sent out and whether they were sent after the surveillance had ended, but he did not check his files in preparation for the hearing or bring them to court (Id. 61, 62, 65, 78).

12. Both Smith and Durham reported to Agent Anderson who had overall responsibility for maintaining the files of the investigation (Id. 84). Anderson knew of the existence of the "June File" which contained secret electronic surveillance information with regard to the investigation. (Id. 88-89). He received Durham's investigatory reports and none showed the wiretap as a source for the information contained in the reports (Id. 105-107). He did not review these reports prior to his court appearance (Id. 106). The investigatory reports are several thousand pages long (Id. 107). Although he thought he could determine with certainty whether or not leads had been developed from the surveillance, he had not done so, by searching files in preparation for the hearing (Id. 113).

13. The record in United States v. Ahamad exemplifies the government's past history of insufficient disclosure of its surveillance activities and the reoccurring absence of meaningful disclaimers of additional unlawful surveillance activity. A search of Justice Department files, without an oral hearing to determine the extent of surveillance will not

ensure any defendant in the instant case that his or her rights under Alderman v. United States are being protected. If the ensuing taint hearing is to be meaningful, the detailed exposure of the government's investigatory process, lacking

THE NEW YORK TIMES, THURSDAY, JUNE 7, 1973

## Texts of Documents Relating to Domestic Intelligence-Gathering Plan in 1970

Special to THE NEW YORK TIMES

WASHINGTON, June 6—The following are the texts of recommendations for increased domestic intelligence gathering made to President Nixon in July, 1970, by an interagency Government committee: an analysis of the committee's report and of strategy to be used to secure the cooperation of J. Edgar Hoover and a "decision memorandum" reflecting President Nixon's approval of the committee's recommendations. The President later received his approval after the plan was opposed by Mr. Hoover.

### Recommendations

#### TOP SECRET

Handle via Comint Channels Only.

#### Operational Restraints

on Intel'gence Collection  
A. Intensive Restriction on Communications Intelligence

#### RECOMMENDATION:

Present interpretation should be broadened to permit and program for coverage by N.S.A. [National Security Agency] of the communications of U.S. citizens using international facilities.

#### RATIONALE:

The F.B.I. does not have the capability to monitor international communications. N.S.A. is currently doing so on a restricted basis, and the

information is particularly useful to the White House and it would be to our disadvantage to allow the F.B.I. to determine what N.S.A. should do in this area without regard to our own requirements. No appreciable risk is involved in this course of action.

#### B. Electronic Surveillance and Penetrations.

#### RECOMMENDATION:

Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

Also, present procedures should be changed to permit intensification of coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community.

At the present time, less than [unclear] electronic penetrations are operative. This includes coverage of the C.P.U.S.A. [Communist Party, U.S.A.] and organized crime targets, with only a few authorized against subject of pressing internal security interest.

Mr. Hoover's statement that the F.B.I. would not oppose other agencies seeking approval for the operating electronic surveillances is gratuitous since no other agencies have the capability.

Everyone knowledgeable in the field, with the exception of Mr. Hoover, concurs that existing coverage is grossly inadequate. C.I.A. and N.S.A. note that this is particularly true of diplomatic establishments, and we have learned at the White House that it is also true of New Left groups.

ONLY COPY AVAILABLE

**C. Mail Coverage****RECOMMENDATION:**

Restrictions on legal coverage should be removed.

Also, present restrictions on covert coverage should be relaxed on selected targets of priority foreign intelligence and internal security interest.

**RATIONALE:**

There is no valid argument against use of legal mail covers except Mr. Hoover's concern that the civil liberties people may become upset. This risk is surely an acceptable one and hardly serious enough to justify denying ourselves a valuable and legal intelligence tool.

Covert coverage is illegal and there are serious risks involved. However, the advantages to be derived from its use outweigh the risks. This technique is particularly valuable in identifying espionage agents and other contacts of foreign intelligence services.

**D. Surreptitious Entry****RECOMMENDATION:**

Present restrictions should be modified to permit procurement of vitally needed foreign cryptographic material.

Also, present restrictions should be modified to permit selective use of this technique against other urgent security targets.

**RATIONALE:**

Use of this technique is clearly illegal; it amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion.

The F.B.I., in Mr. Hoover's younger days, used to conduct such operations with great success and with no exposure. The information secured was invaluable.

N.S.A. has a particular interest since it is possible by this technique to secure material with which N.S.A. can break foreign cryptographic codes. We spend millions of dollars attempting to break these codes by machine. One successful surreptitious entry can do the job successfully at no dollar cost.

Surreptitious entry of facilities occupied by subversive elements can turn up

information about identities, methods of operation, and other invaluable investigative information which is not otherwise obtainable. This technique would be particularly helpful if used against the Weathermen and Black Panthers.

The deployment of the executive protector force has increased the risk of surreptitious entry of diplomatic establishments. However, it is the belief of all except Mr. Hoover that the technique can still be successfully used on a selective basis.

**E. Development of Campus Sources****RECOMMENDATION:**

Present restrictions should be relaxed to permit expanded coverage of violence-prone campus and student-related groups.

Also, C.I.A. coverage of American students (and others) traveling or living abroad should be increased.

**RATIONALE:**

The F.B.I. does not currently recruit any campus sources among individuals below 21 years of age. This dramatically reduces the pool from which sources may be drawn. Mr. Hoover is afraid of a young student surfacing in the press as an F.B.I. source, although the reaction in the past to such events has been minimal. After all, everyone assumes the F.B.I. has such sources.

The campus is the battleground of the revolutionary protest movement. It is impossible to gather effective intelligence about the movement unless we have campus sources. The risk of exposure is minimal, and where exposure occurs the adverse publicity is moderate and short-lived. It is a price we must be willing to pay for effective coverage of the campus scene. The intelligence community, with the exception of Mr. Hoover, feels strongly that it is imperative the [was unclear] increase the number of campus sources this fall in order to forestall widespread violence.

C.I.A. claims there are not existing restraints on its coverage of overseas activities of U.S. nationals. However, this coverage has been gross-

ly inadequate since 1965 and an explicit directive to increase coverage is required.

**F. Use of Military Undercover Agents****RECOMMENDATION:**

Present restrictions should be retained.

**RATIONALE:**

The intelligence community is agreed that the risks of lifting these restraints are greater than the value of any possible intelligence which would be acquired by doing so.

**Budget and Manpower****Restrictions****RECOMMENDATION:**

Each agency should submit a detailed estimate as to projected manpower needs and other costs in the event the various investigative restraints herein are lifted.

**RATIONALE:**

In the event that the above recommendations are concurred in, it will be necessary to modify existing budgets to provide the money and manpower necessary for their implementation. The intelligence community has been badly hit in the budget squeeze. (I suspect the foreign intelligence operations are in the same shape) and it maybe will be necessary to make some modifications. The projected figures should be reasonable, but will be subject to individual review if this recommendation is accepted.

**Measures to Improve Domestic Intelligence Operations****RECOMMENDATION:**

A permanent committee consisting of the F.B.I., C.I.A., N.S.A., D.I.A. [Defense Intelligence Agency] and the military counterintelligence agencies should be appointed to provide evaluations of domestic intelligence estimates, and carry out the other objectives specified in the report.

**RATIONALE:**

The need for increased coordination, joint estimates, and responsiveness to the White House is obvious to the intelligence community. There are a number of operational problems which need to be worked out since Mr. Hoover is fearful of any mechanism which might jeop-

and the CIA. CIA would prefer an ad hoc committee to see how the system works, but other members believe that this would merely delay the establishment of effective coordination and joint operations. The value of lifting intelligence collection restraints is proportional to the availability of joint operations and evaluation, and the establishment of this inter-agency group is considered imperative.

#### Top Secret

### Analysis and Strategy

Memorandum for: H. R. Haldeman

From: Tom Charles Huston  
Subject: Domestic intelligence review

#### 1. Background

A working group consisting of the top domestic intelligence officials of the FBI, CIA, DIA, NAS, and each of the military services met regularly throughout June to discuss the problems outlined by

the President and to draft the attached report. The discussions were frank and the quality of work first-rate. Cooperation was excellent, and all were delighted that an opportunity was finally at hand to address themselves jointly to the serious internal security threat which exists.

I participated in all meetings, but restricted my involvement to keeping the committee on the target the President established. My impression that the report would be more accurate and the recommendations more helpful if the agencies were allowed more latitude in expressing their opinions and working out arrangements which they felt met the President's requirements consistent with the resources and missions of the member agencies.

#### 2. Mr. Hoover

I want to give this exercise credit to Mr. Hoover. He would not have been so cooperative in this, I think. (Director of Central Intelligence) was most cooperative and helpful, and the only stumbling block was Mr. Hoover. He attempted at the last meeting to divert the committee from operational problems and redirect its mandate to the preparation of another analysis of existing intelligence. I declined to acquiesce in this approach, and succeeded in

getting the committee back on target.

When the working group completed its report, Mr. Hoover refused to go along with a single conclusion drawn or support a single recommendation made. His position was twofold:

(1) Current operations are perfectly satisfactory and (2) No one has any business commenting on procedures he has established for the collection of intelligence by the FBI. He attempted to modify the body of the report, but I successfully opposed it on the grounds that the report was the conclusion of all the agencies, not merely the FBI. Mr. Hoover then entered his objections as footnotes to the report. Cumulatively, his footnotes suggest that he is perfectly satisfied with current procedures and is opposed to any changes whatsoever. As you will note from the report, his objections are generally inconsistent and frivolous—most express concern about possible embarrassment to the intelligence community (i.e., Hoover) from public disclosure of clandestine operations.

Admiral Gayler and General Bennett were greatly displeased by Mr. Hoover's attitude and his insistence on footnoting objections. They wished to raise a formal protest and sign the report only with the understanding that they opposed the footnotes. I prevailed upon them not to do so since it would only aggravate Mr. Hoover and further complicate our efforts. They graciously agreed to go along with my suggestion in order to avoid a nasty scene and jeopardize the possibility of positive action resulting from the report. I assured them that their opinion would be brought to the attention of the President.

#### 3. Threat Assessment

The first 23 pages of the report constitute an assessment of the existing internal security threat, our current intelligence coverage of this threat, and areas where our coverage is inadequate. All agencies concurred in this assessment, and it serves to explain the importance of expanded intelligence collection efforts.

#### 4. Restraints on Intelligence Collection

Part Two of the report discusses specific operational restraints which currently restrict the capability of the intelligence community to col-

lect the types of information necessary to deal effectively with the internal security threat. The report explains the nature of the restraints and sets out the arguments for and against modifying them. My concern was to afford the President the strongest arguments on both sides of the question so that he could make an informed decision as to the future course of action to be followed by the intelligence community.

I might point out that of all the individuals involved in the preparation and consideration of this report, only Mr. Hoover is satisfied with existing procedures.

Those individuals within the FBI who have day-to-day responsibilities for domestic intelligence operations privately disagree with Mr. Hoover and believe that it is imperative that changes in operating procedures be initiated at once.

I am attaching to this memorandum my recommendations on the decision the President should make with regard to these operational restraints. Although the report sets forth the pros and cons on each issue, it may be helpful to add my specific recommendations and the reasons therefore in the event the President has some doubts on a specific course of action.

#### 5. Improvement in Inter-Agency Coordination

All members of the committee and its working group, with the exception of Mr. Hoover, believe that it is imperative that a continuing mechanism be established to

effectuate the coordination of domestic intelligence efforts and the evaluation of domestic intelligence data. In the past there has been no systematic effort to mobilize the full resources of the intelligence community in the internal security area and there has been no mechanism for preparing community-wide domestic intelligence estimates such as is done in the foreign intelligence area by the United States Intelligence Board. Domestic intelligence information coming into the White House has been fragmentary and unevaluated. We have not had, for example, a community-wide estimate of what we might expect short or long-term in the cities or on the campuses or within the military establishment.



Unlike most of the bureaucracy, the intelligence community welcomes direction and leadership from the White House. There appears to be agreement, with the exception of Mr. Hoover, that effective coordination within the community is possible only if there is direction from the White House. Moreover, the community is pleased that the White House is finally showing interest in their activities and an awareness of the threat which they so acutely recognize.

I believe that we will be making a major contribution to the security of the country if we can work out an arrangement which provides for institutionalized coordination within the intelligence community and effective leadership from the White House.

#### 6. Implementation of the President's Decisions

If the President should decide to lift some of the current restrictions and if he should decide to authorize a formalized domestic intelligence structure, I would recommend the following steps:

(A) Mr. Hoover should be called in privately for a stroking session at which the President explains the decision he has made, thanks Mr. Hoover for his candid advice and past cooperation, and indicates he is counting on Edgar's cooperation in implementing the new decisions.

(B) Following this Hoover session, the same individuals who were present at the initial session in the Oval Office should be invited back to meet with the President. At that time, the President should thank them for the report, announce his decisions, indicate his desires for future activity, and present each with an autographed copy of the photo of the first meeting which Ollie took.

(C) An official memorandum setting forth the precise decisions of the President should be prepared so that there can be no misunderstanding. We should also incorporate a review procedure which will enable us to ensure that the decisions are fully implemented.

I hate to suggest a further imposition on the President's time, but think these steps will be necessary to pave over some of the obvious problems which may arise if the President decides, as I hope he will, to overrule Mr. Hoover's objections to many of the proposals made in this report. Having seen

the President in action with Mr. Hoover, I am confident that he can handle this situation in such a way that we can get what we want without putting Edgar's nose out of joint. At the same time, we can capitalize on the goodwill the President has built up with the other principals and minimize the risk that they may feel they are being forced to take a back seat to Mr. Hoover.

#### 7. Conclusion

I am delighted with the substance of this report and believe it is a first-rate job. I have great respect for the integrity, loyalty, and competence of the men who are operationally responsible for internal security matters and believe that we are on the threshold of an unexcelled opportunity to cope with a very serious problem in its

germinal stages when we can avoid the necessity for harsh measures by acting swift, discreetly, and decisively to deflect the threat before it reaches alarming proportions.

I might add, in conclusion, that it is my personal opinion that Mr. Hoover will not hesitate to accede to any decision which the President makes, and the President should not, therefore, be reluctant to overrule Mr. Hoover's objections. Mr. Hoover is set in his ways and can be bull-headed as hell, but he is a loyal trooper. Twenty years ago he would never have raised the type of objections he has here, but he's getting old and worried about his legend. He makes life tough in this area, but not impossible—for he'll respond to direction by the President and that is all we need to set the domestic intelligence house in order.

TOP SECRET

#### Decision Memorandum

The White House

Washington

July 15, 1970

TOP SECRET

Handle via Comint Channels only

Subject: Domestic Intelligence

The President has carefully studied the special report of the Interagency Committee on Intelligence (ad hoc) and made the following decisions:

#### 1. Interpretive Restraint on Communications Intelligence

National Security Council Intelligence Directive Number 5 (NSCID-5) is to be interpreted to permit NSA to increase coverage of the communications of U.S. citizens using international facilities.

#### 2. Electronic Surveillances and Penetrations

The intelligence community is directed to intensify coverage of individuals and groups in the United States who pose a major threat to the internal security. Also, coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community is to be intensified.

#### 3. Mail Coverage

Restrictions on legal coverage are to be removed; restrictions on covert coverage are to be relaxed to permit use of this technique on selected targets of priority foreign intelligence and internal security interest.

#### 4. Surreptitious Entry

Restraints on the use of surreptitious entry are to be removed. The technique is to be used to permit procurement of vitally needed foreign cryptographic material and against other urgent and high priority internal security targets.

#### 5. Development of Campus Sources

Coverage of violence-prone campus and student-related groups is to be increased. All restraints which limit this coverage are to be removed. Also, C.I.A. coverage of American students (and others) traveling or living abroad is to be increased.

#### 6. Use of Military Undercover Agents

Present restrictions are to be retained.

#### 7. Budget and Manpower

Each agency is to submit a detailed estimate as to projected manpower needs and other costs required to implement the above decisions.

#### 8. Domestic Intelligence Operations

A committee consisting of the directors or other appropriate representatives appointed by the directors of the FBI, C.I.A., NSA, DIA, and the military

counterintelligence agencies is to be constituted effective August 1, 1970, to provide evaluations of domestic intelligence, prepared periodic domestic intelligence estimates, carry out the other objectives specified in the report, and perform such other duties as the President shall, from time to time, assign. The director of the F.B.I. shall serve as chairman of the committee. Further details on the organization and operations of this committee are set forth in an attached memorandum.

The President has directed that each addressee submit a detailed report, due on September 1, 1970, on the steps taken to implement these decisions. Further such periodic reports will be requested as circumstances merit.

The President is aware that procedural problems may arise in the course of implementing these decisions. However, he is anxious that such problems be resolved with maximum speed and minimum misunderstanding. Any difficulties which may arise should be brought to my immediate attention in order that an appropriate solution may be found and the President's directives implemented in a manner consistent with his objectives.

Tom Charles  
Huston.

**TOP SECRET**  
Handle via Comint  
Channels Only

#### Organization and Operations of the Interagency Group on Domestic Intelligence and Internal Security (IAG)

##### 1. Membership

The membership shall consist of representatives of the F.B.I., C.I.A., D.I.A., N.S.A., and the counterintelligence agencies of the Departments of the Army, Navy, and Air Force. To insure the high level consideration of issues and problems which the Pres-

ident expects to be before the group, the directors of the respective agencies should serve personally. However, if necessary and appropriate, the director of a member agency may designate another individual to serve in his place.

##### 2. Chairman

The director of the F.B.I. shall serve as chairman. He may designate another individual from his agency to serve as the FBI representative on the group.

##### 3. Observers

The purpose of the group is to effectuate community-wide coordination and secure the benefit of community-wide analysis and estimating. When problems arise which involve areas of interest to agencies or departments not members of the group, they shall be invited, at the discretion of the group, to join the group as observers and participants in those discussions of interest to them. Such agencies and departments include the Departments of State (I & R, Passport); Treasury (I.R.S., Customs); Justice (B.N.D.D., Community Relations Service); and such other agencies which may have investigative or law enforcement responsibilities touching on domestic intelligence or internal security matters.

##### 4. White House Liaison

The President has assigned to Tom Charles Huston staff responsibility for domestic intelligence and internal security affairs. He will participate in all activities of the group as the personal representative of the President.

##### 5. Staffing

The group will establish

such subcommittee or working groups as it deems appropriate. It will also determine and implement such staffing requirements as it may deem necessary to enable it to carry out its responsibilities, subject to the approval of the President.

##### 6. Duties

The group will have the following duties:

(A) Define the specific requirements of member agencies of the intelligence community.

(B) Effect close, direct coordination between member agencies.

(C) Provide regular evaluations of domestic intelligence.

(D) Review policies governing operations in the field of domestic intelligence and develop recommendations.

(E) Prepare periodic domestic intelligence estimates which incorporate the results of the combined efforts of the intelligence community.

(F) Perform such other duties as the President may from time to time assign.

##### 7. Meetings

The group shall meet at the call of the chairman, a member agency, or the White House representative.

##### 8. Security

Knowledge of the existence and purposes of the group shall be limited on a strict "need to know" basis. Operations of, and papers originating with, the group shall be classified "top secret" handle via Comint channels only.

##### 9. Other Procedures

The group shall establish such other procedures as it believes appropriate to the implementation of the duties set forth above.

**[TOP SECRET]**



THE NEW YORK TIMES, MONDAY, JUNE 11, 1973

## WEICKER CHARGES F.B.I. USED A PART OF 1970 SPY PLAN

Says Portion Took Effect  
Despite Nixon Assertion  
It Was Withdrawn

CITES MEMO BY AGENCY

Project, Reported Backed  
by Hoover, Involved Hiring  
of Student Informers

Special to The New York Times

WASHINGTON, June 10—Senator Lowell F. Weicker Jr. asserted today that "at least" one aspect of a 1970 domestic espionage plan had gone into effect despite President Nixon's declaration that it had been withdrawn.

The Connecticut Republican, a member of the Senate Watergate committee, cited an internal Federal Bureau of Investigation memorandum dated Sept. 16, 1970, two months after the July, 1970, plan had allegedly been withdrawn.

J. Edgar Hoover, the late director of the F.B.I., approved the hiring of "student informers" and "potential student informers" to report on campus activities, Mr. Weicker said the memorandum showed.

### Objection by Hoover

The domestic security plan, which also called for burglaries and illegal mail interceptions, was said by President Nixon on May 22 to have been approved and then withdrawn at the request of Mr. Hoover.

One of Mr. Hoover's alleged objections, it has been reported, was to hiring students as informers. He was said to have objected for fear the students would "surface in the press."

"It is clear that at least this aspect [of the plan] was put into effect," Senator Weicker said. He was interviewed by Gabe Pressman for tonight's broadcast of "Gabel" on WNEW-TV in New York.

Mr. Weicker also called on the President to "stand before the American people and tell them every single fact" about the Watergate scandals, adding that Mr. Nixon should not "play coy with the American people."

### Dean on Dairy Industry

Meanwhile, Newsweek magazine reported in this week's issue that John W. Dean 3d had alleged that President Nixon knew that dairy industry contributions to his 1972 campaign had been aimed at winning an increase in milk price supports.

The ousted White House counsel has told "investigators," the magazine said, that Mr. Nixon was "personally aware" of the dairymen's gifts in 1971, totaling more than \$300,000, and that he knew the funds were "intended to influence the Government."

It has been known that representatives of the industry met with the President in 1971 and that milk price supports were raised soon afterward. Newsweek said the White House had declined comment.

### Dean Is Quoted

The magazine also attributed the following statements to Mr. Dean:

"The White House, in an effort 'to justify its own misuse of the F.B.I.," ordered a secret report on similar activity in past Administrations.

"Some 'low-level' White House officials considered assassinating Panama's ruler, Omar Torrijos, because they suspected the involvement of high Panamanian authorities in heroin traffic and because they felt the Government had been uncooperative about renegotiating the Panama Canal treaty. E. Howard Hunt Jr., a leader of the Watergate burglars, had a team in Mexico 'before the

Continued on Page 27, Column 2

## WEICKER REPORTS USE OF SPY PLAN

Continued From Page 1, Col. 8

mission was aborted," Newsweek said.

The magazine also reported that Mr. Dean, who was discharged as the White House lawyer on April 30, had charged the President with awareness of efforts to cover up the Watergate scandal.

Gerald L. Warren, the deputy White House press secretary, said today that the President previously denied any involvement in a White House cover-up. Mr. Warren added:

"The White House will have no further official comment on this type of 'John Dean source' story, which uses the national media to create misleading impressions for what are quite clearly, self-serving purposes."

In other Watergate developments today, Secretary of the Interior Rogers C. B. Morton said he was opposed to further hearings by the Senate committee "because I think there's too big a tendency there to try people in a forum which is not designed for that."

Mr. Morton, interviewed on the C.B.S. News "Face the Nation" program, said he believed the courts "can get the facts out."

But George Bush, chairman of the Republican National Committee, supported the hearings. Mr. Bush said on N.B.C.'s "Meet the Press" program that he felt that "the more information out on this, the better."

## WHAT THE SECRET POLICE DID

In his legal brief to the nation two weeks ago clarifying and defending his role in the rolling whirlpool of Watergate, President Nixon sought to preserve a distinction between the illegal campaign espionage of the Committee for the Re-election of the President and the program of wiretaps and buggles he had authorized in the name of national security. The line was fuzzy even as he drew it, and after last week's harvest of new clues to the Administration's secret-police operations—it had very nearly been erased.

The Senate's special Watergate committee uncovered such a cross-fertilization of campaign dirty tricks and "national security" skulduggery that it simply expanded its inquiry to include them both. And despite Mr. Nixon's assurances that his 1970 master plan for domestic spying had been shelved "unused," Senate investigators were looking into allegations that certain aspects of the controversial plan were operational even before the official birth of the White House "plumbers" group in the summer of 1971.

Senate probers, NEWSWEEK's Washington bureau learned, have been told by high Administration officials that illicit methods—including burglary and unauthorized wiretaps—were widely used to try to stop sensitive leaks, to monitor the domestic left and gather information for the prosecution of cases against radicals. The investigators have been told specifically that burglaries were committed in connection with the Seattle Seven, Chicago Weatherpeople, Detroit Thirteen and Berigan cases. They are also looking into allegations that Administration operatives broke into the Brookings Institution, a respected Washington think tank, looking for information on form-

er National Security Council staffer Morton Halperin.

Investigators were still not certain last week whether these operations were undertaken by the FBI or some other official security force or by a plumber-type squad run from the White House or somewhere else outside normal law-enforcement channels. But one Senate investigator called it doubtful that the regular agencies would have gotten formally involved; to the contrary, he said, there is "considerable evidence that they resisted using those methods in the kinds of cases the White House was pushing."

**Shock:** The kinds, as it developed, included not only foreign espionage but a range of domestic dissident activities—and the use of illicit means was rationalized, then as now, on the ground that the end was the nation's security. The justification was spelled out in the set of secret papers delivered by former White House counsel John W. Dean III to Judge John J. Sirica and thence to the Ervin committee—a portfolio including the 1970 spy plan. "From an intelligence point of view," one source quoted the papers as saying, "foreign espionage and sabotage . . . are just not separable" from domestic radical activities. Given this premise, the planners put together what Sen. Sam Ervin

called a scheme for spying so widespread that it would be "a great shock to the American people" if it got out.

Senate investigators now believe that the covert operations that flowed from the plan were run by "a very, very narrow group of White House and Justice Department officials"; they are still putting together the who's who, but one name that intrigues them now is Robert C. Mardian, a ferociously anti-left protégé of former Attorney General Richard Kleindienst and onetime head of the Justice Department's Internal Security Division. Mardian is known to have inherited the plan late in 1970, well after Mr. Nixon says it was aborted; he has likewise been found to have worked on certain "security" matters with G. Gordon Liddy, the sometime White House plumber who later ran the Watergate break-in.

**FBI:** The investigators did not press the issue with Mardian in a wide-ranging, four-hour interview last week. But, NEWSWEEK learned, they did fish up some other fascinating scraps of information. It was Mardian, for example, who learned in the summer of 1971 that William Sullivan, then the assistant director of the FBI, was holding the logs of the seventeen FBI telephone taps authorized by the President and cleared in part by Henry Kissinger to plug some security leaks from 1969 to '71. According to Senate investigators, Mardian—who possessed a rare emergency phone line to the President's office—has told them that he informed the White House of his discovery and was ordered to fly immediately to San Clemente to meet with the President.

Mardian did so in late July (confiding to his seat-mate, John Dean, "This is so hot I can't even talk to you about it") and was ushered into Mr. Nixon's office. "The President told me," Mardian told the probers, "that the logs affected the most delicate decisions he was making,



Mardian: To Nixon with news



National-Security Blanket



Liddy: To Denver with Dita

and his ability to function was imperiled by news leaks of the contents involved." Mardian said he was given direct orders by Mr. Nixon to take charge of the logs. On Aug. 1, he picked them up from Sullivan and "several days" later turned them over to the White House—where, as it developed, John D. Ehrlichman squirreled them away in his own office safe.

Mardian, *NEWSWEEK* learned, has also been giving the investigators some intriguing glimpses of what Liddy might have to say when he takes the stand this week—if, that is, he were talking at all. In their own extensive post-Watergate conversations, according to Mardian, Liddy said it was he who whisked ITT lobbyist Dita Beard out of Washington to a Denver hospital in the thick of the 1972 controversy over an offer by the company to help underwrite the Republican convention. Liddy, according to Mardian, further acknowledged taking part in the burglary of Daniel Ellsberg's psychiatrist's office; he claimed that it had the "express approval" of the President.

**Charges:** Predictably, the Washington inquiries have prompted second thoughts on several still unexplained break-ins. Democratic National Committee Chairman Robert Strauss has told Senate investigators of a mysterious ransacking of his Dallas home one week before the Democratic convention last July. Charles Garry, a San Francisco lawyer for the Black Panthers, claims that his offices were broken into at least twice in 1971—and personal papers were the major loss. And The Los Angeles Times reported that the FBI is investigating the possibility that Liddy and E. Howard Hunt burgled the offices of the NAACP-Legal Defense and Educational Fund, Inc. the weekend they hit Ellsberg's psychiatrist.

The individual charges remain to be sorted. But it is now evident that Nixonians did run secret-police operations against the moderate-to-radical American left—and that they were willing to ignore or break the law for what they judged to be the necessities of national security. They acted in turbulent times—a period when, as GOP Sen. Lowell Weicker of Connecticut said in a speech last week, "America or at least vocal America did want a quick and efficient end" to the tumult of the '60s. But their targeting was at times indiscriminate, their methods often jackboot crude. One of the Administration's proliferated spy shops took on a whole run of home-front intelligence assignments in 1971-72, ranging from a riot watch in the ghettos to a search for foreign connections in the peace movement. A reporter asked a well-wired government hand last week what methods the operatives involved had used. "I'm afraid," the official said wanly, "you'll have to use your imagination."

ONLY COPY AVAILABLE

## PLUMBERS' DATA Reportedly Kept From F.B.I. in 1972

Gray and Petersen Are Said  
to Have Withheld C.I.A.'s  
Reports of Assistance

By DENNY WALSH

Special to the New York Times

WASHINGTON, July 9—For many months, two high Justice Department officials withheld information from Federal Bureau of Investigation agents that would have led the agents much earlier to the White House group set up to scrutinize Government leaks to newsmen, according to sources close to the F.B.I. Watergate investigation.

In early July of last year, less than a month after the Watergate break-in at Democratic national headquarters on June 17, the Central Intelligence Agency furnished the former acting director of the F.B.I., L. Patrick Gray 3d, with documentation of the aid provided by the C.I.A. to the cadre of White House operatives known as the "plumbers," the sources said.

They said that the three Federal prosecutors and F.B.I. field agents assigned to the Watergate case and related matters did not know that Mr. Gray had this material until it was discovered in his office safe after he resigned as head of the bureau on April 27.

### Petersen Got Data

Last October, Henry E. Petersen, an Assistant Attorney General, obtained this information from the C.I.A. and, at the same time, learned that Mr. Gray had been in possession of the material for more than three months, according to the sources.

Mr. Petersen, then in charge of the Watergate investigation, did not pass on the material to the F.B.I. agents working on the case, the sources said, nor did he make it known that Mr. Gray had concealed the material, even when President Nixon nominated Mr. Gray in February, 1973, to be permanent director of the bureau.

Mr. Gray was not available for comment. When Mr. Petersen was reached through a public information officer at the Justice Department, he said he had "no comment."

The following information was pieced together by the New York Times after interviews with a number of persons familiar with the Watergate investigation and all its ramifications, and from various public documents relating to the C.I.A.'s involvement with the Watergate conspirators.

The full scope of C.I.A. support of the "plumbers" was not known to the F.B.I. agents in the case until early in May,

when it came to light independently of them, during the late stages of the trial of Dr. Daniel Ellsberg on charges growing out of his role in publicizing the Pentagon papers.

The agents are known to be angry that Mr. Gray and Mr. Petersen did not share the C.I.A. material with them, and contend that if they had had the information, much of what is now known about the "plumbers," including their burglary of Dr. Ellsberg's former psychiatrist's office, would possibly have emerged sooner.

A key element in the rancor of the agents is that part of the material that Mr. Petersen and Mr. Gray had, they believe, might have led them to knowledge of the burglary months before it was learned by Federal prosecutors in interviewing John W. Dean 3d, former counsel to the President, in April.

Included in the material turned over to Mr. Petersen by the C.I.A. on Oct. 24, according to the sources, was a photograph of G. Gordon Liddy, convicted Watergate conspirator, standing in front of the building in Beverly Hills, Calif., that houses the office of the psychiatrist, Dr. Lewis J. Field-

ing. Sources who have seen the picture said that a reserved parking space marked for Dr. Fielding could be seen in the background.

Both Mr. Petersen and Mr. Gray reportedly had information that E. Howard Hunt Jr., one of the Watergate conspirators who pleaded guilty, had requested that the C.I.A. have someone meet him upon his return from California on the morning of Aug. 27, 1971, to receive some item from him that he wanted processed and returned.

Developments in April and May of this year disclosed that Liddy and Hunt, both part of the "plumbers" group at the time, had engineered the burglary of Dr. Fielding's office on Sept. 3, 1971, as part of a search for information about Dr. Ellsberg. Hunt told the Watergate grand jury here in May that he and Liddy went to California in August, 1971, "to make a preliminary vulnerability and feasibility study" of Dr. Fielding's office.

### Tells of Photographs

He said that they "passed through" the building in which Dr. Fielding had his office and took some photographs "with a very special camera."

Mr. Gray had known since July, 1972, and Mr. Petersen since October, 1972, that the C.I.A. had in the summer of 1971 provided Hunt with, among other things, a commercial Tessina camera disguised in a tobacco pouch, the sources said.

Records of the Beverly Hills Police Department show that the burglary was reported on Sept. 4, 1971, that a man arrested on Oct. 7, 1971, in connection with a theft from a woman's purse confessed to the burglary and that on Nov. 12, 1971, the man renounced the confession.

Some Justice Department officials feel it is "convenient hindsight" for agents to say they might have uncovered the participation of Hunt and Liddy in the burglary with the photograph and other information held by Mr. Petersen and Mr. Gray.

"They [the agents] never had a chance," a source close to the F.B.I. investigation said. "How can you say they wouldn't have gotten to the burglary, when the best leads in the Government's possession were concealed from them?"



In testimony before the Senate Watergate committee two weeks ago, Mr. Dean said that Mr. Petersen once had showed him the C.I.A. material and told him that Mr. Gray had the same material.

"The fact that this material was in the possession of the Department of Justice meant to me that it was inevitable that the burglary of Ellsberg's psychiatrist's office would be discovered," Mr. Dean said. "I felt that any investigator worth his salt would certainly be able to look at the pictures in the files at the Department of Justice and immediately determine the location and from there discover the fact that there had been a burglary at the office that was in the picture."

Included in the material given to Mr. Gray last July was a rundown on how the C.I.A. had furnished alias documents to Hunt in July, 1971, in the name of Edward Joseph Warren, and in the name of Edward V. Hamilton during the more than 20 years Hunt served as a C.I.A. agent. It was also recounted in the documents

turned over to Mr. Gray how the C.I.A. had furnished Liddy with alias documents in the summer of 1971 in the name of George F. Lippard.

For six weeks to two months following the June 17 break-in, F.B.I. agents all over the country worked to prove to the satisfaction of the prosecutors the true identities of the persons who had obviously traveled widely under those aliases. This required the laborious comparison of handwriting samples and fingerprints from hotel and airline records and the identification of pictures of Hunt and Liddy by hotel and airline employees.

During much of this time, according to the sources' reports, Mr. Gray had evidence that would have immediately satisfied the prosecutors—the C.I.A.'s own record of the help it gave to the "plumbers." Mr. Petersen learned in October that the acting F.B.I. director had remained silent while supervising his agents' tedious efforts on the aliases.

When Mr. Petersen received the material from the C.I.A., it reportedly included transmittals to Mr. Gray dated July 5 and July 7, 1972.

However, when the prosecutors were finally allowed to review the C.I.A. material 33 days after Mr. Petersen obtained it, there was nothing in the documents they saw to indicate that Mr. Gray had the same material, and Mr. Petersen did not mention that fact to the prosecutors, even though he had given Mr. Dean, the Presidential counsel, that information around the same time, according to Mr. Dean.

The C.I.A. documentation was turned over to Mr. Petersen in response to a series of questions submitted to the agency by Earl J. Silbert, principal Assistant United States Attorney in the

District of Columbia who was then the chief prosecutor in the Watergate case. Richard Helms, then director of the C.I.A., arranged to turn over the material to Richard G. Kleindienst, then Attorney General.

In a telephone interview, Mr. Kleindienst said that the material was delivered to him in a manila envelope and that he delivered it to Mr. Petersen without opening it. He said that he never knew what was in the envelope.

Mr. Kleindienst strongly urged the President to nominate Mr. Gray to head the F.B.I. on a permanent basis.

#### Kleindienst Comments

The former Attorney General, who stepped down rather than involve himself in a Watergate investigation that led repeatedly to his personal friends and political associates, indicated he was not aware of Mr. Gray's possession of the C.I.A. material.

Asked why Mr. Petersen did not give the material to the F.B.I. agents in the case, Mr. Kleindienst said:

"Mr. Petersen would have shown it to anybody. I'm sure, who he felt should have seen it in connection with any legitimate investigation. He wouldn't have shown it to anybody who he didn't feel needed to see it."

"Henry didn't secrete anything for devious reasons, nor did he in any way impede the investigation. I know Henry well, and I know that his only interest was to have a fair, intensive investigation. He wasn't involved in a witch hunt, but he was interested in anything that bore on the investigation."

Mr. Gray was apparently given the C.I.A. information as a result of his liaison with Lieut. Gen. Vernon A. Walters, deputy director of the intelligence agency.

# Spying Missions and 2 Wiretaps Laid to Ehrlichman by Officials

By SEYMOUR M. HIRSH  
Special to The New York Times

N.Y. Times  
6/6/73

WASHINGTON, June 5—John Edgar Hoover, Director of the Federal Bureau of Investigation, today announced a series of espionage missions and at least two previously undisclosed illegal wiretaps operating in 1969 that were carried out by an alleged White House intelligence group, officials knowledgeable about the Watergate investigation said today.

In addition, the director said, detailed reports on a number of White House-related blemishes was furnished by Mr. Ehrlichman, although it could not be learned whether any such blemishes—on a long-planned foray into the Browne Institution, for example—actually took place.

Most of the operations were coordinated by John J. Caulfield and Anthony F. Ulasewicz, two former New York City police officers who were working for the White House in early 1969, the officials said. Leading an investigation into the background of Mr. Blum, who was defeated in yesterday's New York mayoral primary.

Mr. Blum, as a crusty man Representative from the Bronx in 1969, bitterly criticized as "insulting" to Italian-Americans an early Nixon crime message to Congress calling for an at-

tack on organized crime.

In addition, Mr. Ehrlichman's aide, Mr. Caulfield, informed Mr. Hoover that the group—described by Hoover as "a group of persons" operating "on the basis of information" supplied by Mr. Nixon to investigate the Pentagon papers—also questioned a number of participants in and even witnesses to the massacre at My Lai in South Vietnam in 1968 or early 1969 in connection with the first "massacre" of the Vietnam War.

One Government investigator said that a full description of the White House group's work would be provided to the Senate Watergate committee by John W. Dean III, the former White House counsel, who is scheduled to testify next Wednesday, having court intervention.

## Testimony by Caulfield

In his televised testimony last month before the Senate Watergate committee, Mr. Caulfield, a former undercover policeman in New York, gave a far from complete description of his final assignment inside the White House.

"During the first three years," he said, "first on orders from Mr. Ehrlichman and later, in some instances, on orders from Mr. Dean, Mr. Ulasewicz, under my supervision, performed a variety of investigative functions, reporting the results of his findings to the White House through me. I do not fully recall all of the investigations performed in this fashion."

Officials said that, in addition to about 18 clandestine intelligence missions, Mr. Caulfield and Mr. Ulasewicz were directly involved in the installation of a wiretap on telephone lines leading to the Georgetown residence of Joseph Kraft, the syndicated columnist.

A source who was closely involved said that the wiretap was installed in early 1969 at the express direction of Mr. Ehrlichman. "Caulfield didn't do it personally," he said, "but got someone else to look at it."

At one point before the installation of the wiretap, the source said: "Caulfield asked Ehrlichman why they [the White House] didn't go to the F.B.I. since he had been told to put it in for national security purposes."

He was told by Ehrlichman, "Well, the F.B.I.'s a sieve. Things get out that way."

A wiretap was installed and it did operate, the source said, although Mr. Kraft was out of town at the time. Later, the colonel returned, he said, Mr. Ehrlichman got in touch with Mr. Caulfield "and said to forget it; they had it another way."

The source said that Mr. Caulfield assumed that the White House had prepared upon J. Edgar Hoover, then the director of the Federal Bureau of Investigation, to take over the bugging of Mr. Kraft.

Mr. Caulfield ordered his men to return to the Kraft residence and remove the wiretap, the source said, with British cooperation involving the use of a ladder outside the second floor of the home.

Mr. Caulfield knows of at least one other wiretap that was installed on Mr. Ehrlichman's orders outside the normal F.B.I. channels, the official source said. That wiretap involved someone "in the family," he added cryptically, in an apparent reference to someone in the Administration.

It could not be learned whether the blemishes in the Watergate case were planning to conduct a separate investigation into the allegations of illegal wiretapping.

Both the prosecutors and the Senate Watergate committee are known to have received full accounts of the ad hoc White House group's activities from Mr. Dean, Mr. Caulfield and Mr. Ulasewicz.

One closely involved person said that the planned break-in at the Brownings Institution, a liberal Washington research group, was discussed sometime in 1971, Mr. Caulfield was told, the source said, that high White House officials "wanted some papers out of somebody's file." He did not know, he said, whose file was involved.

It has been widely reported that President Nixon personally authorized the wiretapping of 13 National Security Council and Pentagon aides as well as four newsmen in May, 1969, after what officials described as a serious news leak.

### Halperin at Brookings

In 1969, Morton H. Halperin, then a member of the council staff, resigned and became associated with Brookings, a relationship he still maintains. Mr. Halperin has also been associated with Dr. Daniel Ellsberg, whose Federal trial on charges stemming from his copying and releasing of the Pentagon papers recently ended with the judge dismissing the case because of the misconduct of the Government. The papers were classified Government documents about the origins of the Vietnam war.

There is some evidence that Mr. Caulfield's ad hoc group was completed, at least in some respects, by the plumb line operation which was organized in July, 1971.

In a court suit disposition released today, Mr. Ehrlichman is said to be conceding that in September, 1971, Mr. Gordon (name), the former member of the plumb line group who later led the Watergate break-in team, was initially introduced to the new man in place of Caulfield.

And Mr. Caulfield, in his Senate testimony, has noted some other plumb line activity in the spring of 1971. It is to note that, for some reason, the group of this sort of work had been directed through Mr. Ehrlichman.

One closely placed source said that one of the main functions of Mr. Ulasiewicz, who had been hired through Mr. Caulfield after spending 20 years in police work, was to attempt to infiltrate large demonstrations in Washington. They would be spread around with them and then, the source said, "It was silly and they might just as well have had the local police do it."

It has been previously reported that Mr. Ulasiewicz was hired by Mr. Ehrlichman after a clandestine meeting in mid-1970 at La Guardia Airport and paid in cash by Herbert W. K. Imbach, who was then President Nixon's personal attorney. The funds for Mr. Ulasiewicz were reported to have been authorized by H. R. Haldeman, the former White House chief of staff.

Both Mr. Caulfield and Mr. Ulasiewicz achieved national prominence during the first of the televised Senate Watergate hearings last month when it was alleged that they had both participated in a White House-directed effort early this year to offer executive clemency to James W. McCord Jr., one of the Watergate conspirators, in return for his silence.

One knowledgeable official said that most of the Caulfield-Ulasiewicz assignments "involved specific events that already happened." He added, "They were just checking out press reports to seek what else they could learn that wasn't in the newspapers—like My Lai."

"That's not illegal," the official declared.

Asked if Mr. Ehrlichman was

directing the White House intelligence operation, the official said: "On God, yes. Caulfield wasn't thinking these things up."

The only surveillance project that was initiated by the two men was the investigation into the recruitment of Mr. Eder, their former colleague on the New York police force, the official said, although that effort also received White House sanction.

Mr. Biaggi's sharp attacks on the Presidential crime message began in early May, 1979. In one news conference, Mr. Biaggi said that he had been troubled by Mr. Nixon's message in which he sought "out Italian-Americans for undesired notoriety while there are organizations in existence openly exposing violence and whose acts border on terrorism—a blatant reference to radical and war groups."

### 5 Other Implicates

The source said that Mr. Caulfield and Mr. Ulasiewicz both suspected that Mr. Biaggi had some connections to organized crime, a suspicion they apparently could not confirm with their clandestine research. The two men have been publicly linked to at least five other undercover investigations in 1970 and 1971 with various political overtones.

These included research into the Chippewa-Indians incident involving Edward M. Kennedy, Democrat of Massachusetts, in 1970 a potentially explosive investigation involving Representative Carl Albert, Democrat of Oklahoma, the House Speaker, possible financial links between Senator Edmund S. Muskie, Democrat of Maine, and some corporations with pollution problems; the routing of Senator Robert H. Humphrey's 1968 campaign for the Presidency, and rumors that the brother of a leading Democrat might have been involved in a homosexual incident.

In addition, Mr. Caulfield and Mr. Ulasiewicz also reportedly investigated the alleged harassment of Mrs. David Eisenhower by a Florida school teacher. Mrs. Eisenhower is President Nixon's younger daughter, Julie.

Mr. Ulasiewicz is now living in Hadley, N. Y. Mr. Caulfield was dismissed last month from his post as assistant director of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms.



# F.B.I. Informer Is Linked To Right-Wing Violence

By STEVEN V. ROBERTS  
Special to The New York Times

SAN DIEGO, June 23—A lead-ordinator had pleaded guilty of a right-wing, paramilitary organization that harassed young leftists here for more than a year says that the group was partly organized and financed by an informer for the Federal Bureau of Investigation. Law enforcement officers and others familiar with the situation corroborated his account.

The informer, Howard Berry Godfrey, participated in a shooting as well as several fire-bombings and burglaries, while receiving regular payments from the F.B.I. for his services, it was said.

This account was provided this week by Jerry Lynn Davis, the former Southern California coordinator for the Secret Army Organization, a well-armed outgrowth of another right-wing group, the Minutemen.

## Segretti Recognized

In another development this week, two members of the Secret Army Organization reportedly recognized a photograph of Donald H. Segretti, the young lawyer accused of organizing a Republican espionage campaign last year. According to The Door, a local radical newspaper, the two rightists identified the man in the photograph as "Donald Simms," whom they said they met in the summer of 1971 at a shooting range frequented by members of the Secret Army Organization.

The two men reportedly said that "Simms" was present at a discussion among the right-wingers about the Republican National Convention, originally scheduled to be held in San Diego last August before it was moved to Miami Beach. "Simms" did not participate in the discussion but an unidentified companion did, according to The Door's sources.

Mr. Segretti, who has been indicted for distributing false campaign literature in Florida, often used the name "Donald Simmons" in recruiting espionage agents.

It is also known that Mr. Segretti and the Secret Army Organization at different times, discussed the idea of abducting radicals who might disrupt the convention. But so far, there has been no firm evidence linking Mr. Segretti to the right-wing group.

Davis, a 31-year-old construction worker, spoke to a reporter after being released last Thursday from jail, where he had been held pending his sentencing on a charge of possession of explosives. The Secret Army Organization co-

ordinator had pleaded guilty and was granted probation. According to Davis's account, the Secret Army Organization was formed in 1971 to train guerrillas who could organize a resistance movement should the United States be conquered by a foreign power. Howard Godfrey, the F.B.I. informer, was one of the six founding members and contributed the money used to print the group's recruiting literature, Davis said.

In addition, Godfrey was considered a "firebrand" within the organization and took a "more militant line" than most members, Davis said.

According to his own court testimony, Godfrey was riding in a car on Jan. 6, 1972, when another member of the Secret Army Organization fired a shot into a house occupied by young leftists. The bullet shattered the elbow of a girl named Paula Tharp. Miss Tharp and other residents of the house were planning demonstrations at the Republican convention.

Godfrey took the gun used in the shooting and gave it to his F.B.I. contact. The agent hid it under his couch for six months until the Secret Army Organization member who shot Miss Tharp was finally apprehended by the police. The incident cost the agent his job.

## 'Antipoverty Program'

Given Godfrey's contributions to the Secret Army Organization in time and money, Davis said, "you might say that the S.A.O. was a federally funded antipoverty program for the right wing."

Godfrey's role was partly disclosed last June, when a member of the Secret Army Organization was arrested for blowing up a movie theater that showed pornographic films.

According to well-informed sources, the San Diego police learned that the F.B.I. had an informer within the right-wing organization, but the bureau refused to disclose his identity. When the police chief threatened to expose the bureau's lack of cooperation the F.B.I. agreed to let Godfrey testify against the bomber.

On the stand, Godfrey admitted that he had supplied the explosives used in the bombing.

Asked why Godfrey was allowed to operate for so long, a spokesman for the F.B.I. here said that "we certainly don't condone" illegal acts by informers. But he declined to comment further.

New York Times, 6/24/73

ONLY COPY AVAILABLE

STATE OF NEW YORK

SS.:

COUNTY OF NEW YORK

145

JEFFREY SMILOW, being duly sworn, deposes and says:

1. I reside at 1050 54th Street, Brooklyn, New York.

2. I have been a member of the Jewish Defense League since approximately November, 1968.

3. The JDL was established in 1968 for the purpose of protecting Jews from anti-semitic attacks. We began helping New York Jews and then expanded our work to attempt to help Jews all over the world. We held demonstrations to express our solidarity with Jews who were suffering persecution in other countries, namely Russia and the Arab countries, and to protest anti-semitic policies in those countries. We attempted to force the American government to take action to combat anti-semitism at home and abroad. Besides demonstrations we published leaflets and held education programs to try to make people aware of the prevalence of anti-semitism in the United States and throughout the world. Our guiding principle is expressed by the Hebrew words "Ahavat Yisroel", which means love of Jews. We wanted to teach Jews to help other Jews in whatever way they needed, and to sacrifice for them.

4. During my first year of JDL membership (1968-69) I went to several demonstrations and was fairly active in local JDL activities. I went to most meetings and neighborhood patrols. The following school year (1969-70) I was not very active in JDL but the following school year, beginning in September of 1970 I was very active in the organization. I went to all demonstrations

and often worked in the office which was then at 440 W. 42nd Street, and attended meetings there. I talked on the telephone at that office. During the summer of 1971 the JDL office moved to 4002 New Utrecht Avenue in Brooklyn. I spent every evening there and went to every JDL activity there in both daytime and evening. I spent at least three or four hours a day there all summer. When school began, I started cutting classes and by January I was spending eight hours a day in the office. My job was director of publicity and public relations. I ran the mimeograph machine and had to make sure we always had a complete supply of our educational materials. I made all of our leaflets, press releases etc. Before handling publicity I was in charge of our mailings to membership. I took classes at night at the office. I had a key to the office and frequently opened it in the morning. I occasionally stayed very late and once spent the night in the office. After January 1972 I was paid \$15.00 a week. I was on the administrative board where I reported on my work. In approximately February or March I was elected to our executive board which made organization policy.

5. I have talked to many JDL members on the telephone including Sheldon Siegel.

6. My lawyers in connection with this matter have been Hyman Bravin, Nathan Lewin, Stanley Cohen, Martin Elefant, Bertram Zweibon, Barry Slotnick and Robert Leighton. Their telephone numbers are annexed to this affidavit.

Sworn to before me this  
1st day of November, 1973

\_\_\_\_\_  
JEFFREY SMILOW

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

JEFFREY SMILOW, being duly sworn, deposes and says:

1. When the JDL office was on New Utrecht Avenue in Brooklyn we frequently saw as many as seven FBI cars and New York City BOSS cars parked near the headquarters. I know that they were FBI and BOSS cars because the men inside them told our members who they were and that we were under surveillance. On information and belief some of our members were followed by these men and people coming and going from our office were photographed. I saw cameras in the cars. And I saw them take pictures of us.

2. Frequently in the morning when we arrived at our office we found the metal doors to the basement lifted off. All JDL files were kept in the basement.

Sworn to before me this

\_\_\_\_\_  
JEFFREY SMILOW

1st day of November, 1973

\_\_\_\_\_  
NOTARY PUBLIC

Morris Stillman  
116 Rockwood Place  
Englewood, N.J.

JEDERY SMILOW: PHONE CALLS

Smilow Home  
1050 - 54th Street  
Brooklyn, N.Y.  
GE5-3107

JDL Office  
4002 New Utrecht Ave.  
Brooklyn, N.Y.  
854-2189  
854-3463  
854-5920

Old JDL Office  
440 West 42nd Street  
N.Y.C.  
868-1953

Stuart Cohen  
161-55 Jewel Ave.  
Queens  
591-3780; 591-3709

Sheldon Davis  
739-3305

Murray Elbogen  
1345 56th St.  
Boro Park, N.Y.  
851-7205

Marty Elefant  
57 Wellington Court  
Brooklyn, N.Y.  
859-6176

Bert Zweibon  
home-- 135-39 228th St.  
Laurelton, Queens  
IA5-3215  
office--22 East 40th St.  
N.Y.C.  
679-1814

Hy Braven - 228-2700  
Nat Lewin - (202) 293-6400  
Bob Persky - (201) 653-4911-office  
(201) 434-2274-home  
Bob Leighton - CO7-6016  
Barry Slotnick - BE3-5390

Russ Kelner  
P.O. Box 3007  
Philadelphia, Pa.  
(215) LI8-7342

Dr. William Perl  
84-11 48th Ave.  
College Park, Maryland  
(301) 474-1762

Neil Rothenberg  
550 Grand Street  
N.Y.C.  
254-6876

Irving Rubin  
58 W. Peco St.  
Los Angeles, California  
(213) 937-8878

RICHARD HUSS: PHONE CALLS

150

Huss' Home  
5 Staten Island Blvd.  
Staten Island, N.Y.  
442-6115

JLL Offices  
4002 New Utrecht Ave.  
Brooklyn, New York  
854-2189  
854-5920  
854-3468

Stuart Cohen  
161-55 Jewel Ave.  
Flushing, Queens  
591-3709

Sheldon Davis  
739-3305

Garth Kravatt  
931 East 100th Street  
272-9670

Liz Lefman  
700 Victory Blvd.  
Staten Island, N.Y.  
981-1845

Arthur Miller - Lawyer

Bob Persky  
(201) 653-4911-office  
(201) 434-2274-home

Neil Rothenberg  
550 Grand Street  
N.Y.C.  
254-6976

Bertram Zweibon  
home-135-39 228th St., Laurelton, Queens  
LA5-3215  
office-22 East 40th Street, N.Y.C.  
679-1814



UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :

Plaintiff :

v. :

Indictment No. 14886

AHMAD, et al., :

Defendants :

STATE OF CALIFORNIA )  
 ) ss.:  
COUNTY OF LOS ANGELES)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF  
DEFENDANTS' MOTION FOR DISCLOSURE OF  
ELECTRONIC SURVEILLANCE, FOR A PRE-  
TRIAL HEARING, TO SUPPRESS EVIDENCE  
AND TO DISMISS THE INDICTMENT.

MICHAEL E. TIGAR, being sworn, deposes and says:

1. I am making this affidavit in support of the defendants' motion to disclose electronic surveillance, and to inform the Court of the need for an evidentiary hearing on said motion.

2. In my experience as defense counsel in a number of cases involving illegal electronic surveillance, I have discovered a great deal concerning the techniques of the Federal Bureau of Investigation in conducting such surveillance and then concealing the fact of surveillance even from Justice Department attorneys, and concealing the fruits of such surveillance from defendants indicted, in part, as a result of evidence obtained by unlawful means. The assertions below arise from my representation of the defendants in the following cases, or (in some cases) from my

association with the defense counsel who were in the same law firm as I. The cases in question are United States v. Fred Black, Jr., District of Columbia; United States v. Bernard McGarry, Massachusetts; United States v. Robert G. Baker, District of Columbia; United States v. Ivanov, New Jersey; United States v. Nesline, District of Columbia; United States v. Dellinger, Chicago; United States v. H. Rap Brown, New Orleans; United States v. Roselli, Los Angeles; United States v. Marshall, Seattle; United States v. Smith, Los Angeles; United States v. Alderman and Alderisio, Denver.

3. Based on my experience in these and other cases, I know that the Federal Bureau of Investigation keeps files on persons by name. Each such file is maintained in an FBI field office or at FBI headquarters ("the seat of government", in FBI parlance) in Washington, D.C. Sometimes, more than one office will have an open file on a particular individual. These files are kept by number. All documents and reports about the individual in question are filed in chronological order in such files. In addition, all names of persons on such documents and reports are separately indexed. Thus, if at any time the FBI wants to open a new file on someone, an "indices check" is run to gather up all information in other files relating to that individual. The documents and reports making up the file consist in large part of FBI Forms 302, standard FBI Special Agent report forms.

4. The FBI "case agent", or agent assigned to keep a file, may have a number of files under his control at one time. He is the actual custodian of the file. However, he receives reports from many sources, and may not be aware of the identity of all these sources. For example, an FBI agent in Washington, D.C., may receive information for the Las Vegas Field Office that "LV-90-C" reported that two named individuals had a conversation. Only by decoding the number of the anonymous "LV-90-C" can the agent know whether it represents an anonymous live informant or an electronic device. FBI agents in the Black and Baker cases both admitted under cross-examination that they often were unable to tell from looking at their own case files whether a given item of information emanated from a live informant or a bug. It was necessary to trace each item of information in the file back to its source and to determine this fact. Thus, in the Baker case, FBI case agent Paul Kenneth Brown did not know that several items of information on Robert G. Baker which had been in his possession for years had come from an illegal bug until he traced those items back into the FBI case file on another individual and made this determination. These facts illustrate the need for a hearing.

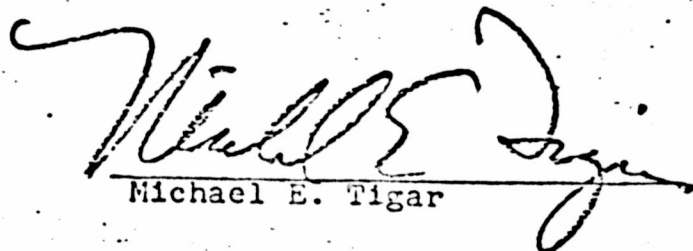
5. Further, when an FBI agent knows that information he has received emanated from an unlawful source, he will conceal

this fact from his superiors and from others who may read the case file. In the H. Rap Brown case, FBI case agent Heibel testified that he learned from the New Orleans Police Department that Brown had conversations with his attorney, William M. Kunstler, and that these conversations had been wiretapped by the New Orleans authorities. Agent Heibel made a memorandum embodying the contents of these confidential lawyer-client conversations, but said in the memorandum that a "confidential informant" had told him the information. This memorandum was placed in the FBI case file on H. Rap Brown. Thus, no one other than Heibel would know from reading the file that it contained material emanating from an unlawful electronic device.

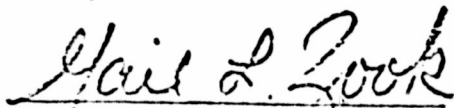
6. Another practice of illegal wiretappers and surveillance experts, such as FBI agents, is isolation of illegally-obtained material from other material in the FBI file. It is an admitted practice of FBI agents to set up, in addition to the main "case file," a "sub-two" file of confidential material from both live and electronic sources. This sub-file is kept separate from the rest of the file, and all its pages are labelled "June", which is an FBI code word for "Secret". Agents Paul Kenneth Brown and Robert Heibel admitted to me under oath the existence of "June" and "Sub-two" files. It is reasonable to suspect that such files would be especially useful to the FBI in so-called "national security" cases.

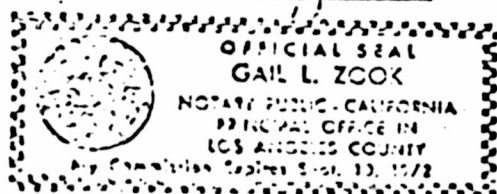
7. Electronic surveillance is not limited to the FBI. Various Justice Department officers have at various times parti-

cipated in such surveillance, obtaining authorizations to conduct it without clearing with the FBI. Such was the case in United States v. Baker. Moreover, the Organized Crime Division of the Department of Justice and one of its co-ordinators, Owen Burke Yung, repeatedly made use of illegal surveillance and destroyed the records of such surveillance. The tapes made from wiretapping were merely listened to, used to gain investigative leads, and then erased. A search of Justice Department files without an oral hearing to determine the extent of surveillance would not ensure any defendant that his or her rights under the Alderman decision were being protected.

  
Michael E. Tigar

Sworn and Subscribed to  
before me this 11<sup>th</sup> day  
of April, 1971





156

JEFFERY SMILLOW: PHONE CALLS

Smilow Home  
1050 - 54th Street  
Brooklyn, N.Y.  
CE5-3197

JDL Office  
4002 New Utrecht Ave.  
Brooklyn, N.Y.  
854-2159  
854-3463  
854-5920

Old JDL Office  
440 West 42nd Street  
N.Y.C.  
868-1953

Stuart Cohen  
161-55 Jewel Ave.  
Queens  
591-3780; 591-3709

Sheldon Davis  
739-3305

Murray Elbogen  
1345 56th St.  
Boro Park, N.Y.  
851-7205

Marty Elefant  
57 Wellington Court  
Brooklyn, N.Y.  
859-6176

Russ Kelner  
P.O. Box 3007  
Philadelphia, Pa.  
(215) LI8-7342

Morris Stillman  
116 Rockwood Place  
Englewood, N.J.

Bert Zweibon  
home- 135-39 228th St.  
Laurelton, Queens  
LA5-3215  
office-22 East 40th St.  
N.Y.C.  
679-1814

Hy Braven - 228-2700  
Nat Lewin - (202) 293-6400  
Bob Persky - (201) 653-4911-office  
(201) 434-2274-home  
Bob Leighton - CO7-6016  
Barry Slotnick - BE3-5390

Dr. William Perl  
84-11 48th Ave.  
College Park, Maryland  
(301) 474-1762

Neil Rothenberg  
550 Grand Street  
N.Y.C.  
254-6876

Irving Rubin  
58 W. Peco St.  
\* Los Angeles, California  
(213) 937-8878

RICHARD HUSS: PHONE CALLS

Huss' Home  
5 Staten Island Blvd.  
Staten Island, N.Y.  
442-6115

JDL Offices  
4002 New Utrecht Ave.  
Brooklyn, New York  
854-2189  
854-5920  
854-3463

Stuart Cohen  
161-55 Jewel Ave.  
Flushing, Queens  
591-3709

Sheldon Davis  
739-3305

Garth Kravatt  
931 East 100th Street  
272-9679

Liz Lefman  
700 Victory Blvd.  
Staten Island, N.Y.  
981-1845

Arthur Miller - Lawyer

Bob Persky  
(201) 653-4911-office  
(201) 434-2274-home

Neil Rothenberg  
550 Grand Street  
N.Y.C.  
254-6976

Bertram Zweibon  
home-135-39 228th St., Laurelton, Queens  
LA5-3215  
office-22 East 40th Street, N.Y.C.  
679-1814



OPINION OF JUDGE GRIESA

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
	:	
UNITED STATES OF AMERICA	:	
	:	
v.	:	73 Cr. Misc. 25
	:	
RICHARD HUSS,	:	
	:	
Defendant.	:	
-----X	:	
	:	
UNITED STATES OF AMERICA	:	
	:	
v.	:	73 Cr. Misc. 24
	:	
JEFFREY H. SMILOW,	:	<u>OPINION</u>
	:	
Defendant.	:	
-----X	:	

GRIESA, J.

These are two criminal contempt cases brought on by orders to show cause signed by Judge Bauman on June 28, 1973. The trials were originally scheduled for July 1973, but were adjourned for several reasons, including the need to permit defendants time to change counsel. Both cases arise from the refusal of defendants to testify as witnesses in a criminal case before Judge Bauman. United States v.

Stuart Cohen and Sheldon Davis (72 Cr. 778). The latter case arose from the bombing on January 26, 1972 of the New York offices of Columbia Artists Management, Inc. and the impresario Sol Hurok. As a result of the refusal of these defendants to testify, the Government was unable to proceed, and the case was terminated.

Both defendants now move for production of any and all types of documentary materials relating to electronic or other surveillance which might have been carried out by any governmental agency or private party concerning (1) communications to which defendants were parties; (2) communications of members of the Jewish Defense League; (3) communications at any place in which defendants had an "interest"; and (4) various other types of communications that might relate to defendants. The motion requests that, if records of such surveillance are non-existent, certain information about the surveillance should be provided.

The basic purpose of requesting this material is to lay a basis for a possible argument that the Government learned of defendants' identity from illegal surveillance, and that any evidence they might have given at the criminal trial would therefore have been tainted.

160

Defendants also move for disclosure of statements made by them to government personnel.

Defendants also move to dismiss the contempt charges against them on two grounds: First, that the immunity granted to them at the trial before Judge Bauman was insufficient to protect their rights under the Fifth Amendment; second, that the applicable statute and rule providing for criminal contempt -- 18 U.S.C. § 401 and F.R. Cr. P. 42 -- are unconstitutional in that there are no specified limits placed upon the punishment which can be imposed for criminal contempt.

The motions are denied in all respects.

The prior procedural steps in this matter, and most of the relevant facts, are set forth in the opinion of the Court of Appeals in United States v. Richard Huss, Jeffrey H. Smilow and Sheldon Seigel, 482 F.2d 38 (2d Cir. 1973). The Court of Appeals affirmed the civil contempt citations of Judge Bauman against defendants Huss and Smilow, while reversing the civil contempt citation against another prospective witness at the criminal trial -- Sheldon Seigel. The precise questions involved in that case will be described in more detail shortly.

On June 19, 1972 Stuart Cohen and Sheldon Davis, as well as Sheldon Seigel, were indicted in the Southern District of New York for the January 26, 1972 bombing. A superseding indictment was filed on July 3, 1972, charging these three defendants plus a fourth, Jerome Zellerkraut.

Prior to the first of these indictments Smilow had appeared before the grand jury, but refused to testify on several grounds. One of the grounds was an assertion that the grand jury questions had been derived from information acquired through illegal electronic surveillance on a telephone at the office of the Jewish Defense League. Smilow also contended that his religious beliefs forbade his acting as an informer.

Smilow was held in contempt by the District Court in a civil contempt proceeding. This judgment was affirmed by the Court of Appeals. 465 F.2d 802. Smilow petitioned for certiorari to the Supreme Court. In a memorandum submitted to the Supreme Court, the Government admitted for the first time "that there is a possibility that petitioner was overheard in the course of an electronic surveillance conducted with the approval of the Attorney General in the interests of national security." After receipt of this memorandum the Supreme Court remanded the proceedings to the Court of Appeals for further consideration. 409 U.S. 944.

The Court of Appeals in turn remanded the matter to the District <sup>Court</sup> to determine whether Smilow's conversations were the subject of government wiretapping and whether such surveillance was illegal. 472 F.2d 1193. The order of civil contempt in connection with the grand jury proceedings was subsequently dismissed on the Government's motion.

Trial of the criminal action was originally scheduled to commence in February 1973. However, on February 2, 1973 the Government moved to sever Sheldon Seigel from the trial on the ground that Seigel was a government informer who would be called as a witness at the trial under a grant of immunity.

Seigel moved for an order preventing the Government from calling him as a witness on the ground that any questions the Government intended to ask him would be based on information gleaned from illegal electronic surveillance and other violations of his constitutional rights. In response to this motion the Government admitted the existence of illegal F.B.I. wiretapping involving Seigel. Judge Bauman thereupon held a taint hearing to determine the validity of Seigel's claims, resulting in a denial of Seigel's motion on April 25, 1973.

Trial of the criminal case commenced on May 30, 1973 and Seigel was called as the Government's first witness. Seigel refused to answer the questions posed to him, and was held in civil contempt pursuant to 28 U.S.C. § 1826(a).

The next witness called by the Government was Huss. However, before questioning of Huss began, Judge Bauman adjourned the trial for one week, during which time the Government was directed to determine whether the Central Intelligence Agency had conducted electronic surveillance of several persons involved in the case. On June 8, 1973 the Government denied the existence of such electronic surveillance as to Seigel and all others involved in the case.

The trial reconvened on June 8. Seigel was recalled to the stand and was granted immunity, but refused to answer questions regarding the Hurok bombing, and was again held in civil contempt.

Huss and Smilow were then called as witnesses and granted immunity under 18 U.S.C. § 6002. They refused to answer questions and were held in civil contempt. Huss and Smilow were committed to a federal detention center for a period not to exceed the duration of the court proceedings, but in no event in excess of 18

164

months, or until they decided to testify. 28 U.S.C. § 1826(a).

Seigel, Huss and Smilow appealed to the Court of Appeals. 482 F.2d 38. The Court reversed and vacated the order of civil contempt against Seigel.

The Court considered that there was a possibility that an illegal FBI wiretap on the offices of the Jewish Defense League in Brooklyn may have been the source of the Government's knowledge of Seigel's identity. The Court also took the view that Seigel was disabled from effectively litigating the taint question because the Government had destroyed the tapes of the illegal wiretaps.

However, the Court of Appeals affirmed the civil contempt citations against Huss and Smilow. The Court rejected Huss's argument that he was not required to testify because Jewish law forbade him to testify against a fellow Jew in a non-Jewish court.

The Court also rejected the three arguments advanced by Smilow: (1) the contention based upon Jewish law; (2) a double jeopardy argument; (3) the contention that his refusal to testify was justified because there was illegal electronic surveillance of Jewish Defense League offices and the tapes of such surveillance had been destroyed. In connection with the latter argument, the Court



stated:

"At no time did Smilow's counsel request a hearing, nor did he suggest that the government's questioning of Smilow had been tainted by illegal electronic surveillance. ... It was abundantly clear to counsel that Seigel, not the wire-tap, was the source of the government's information concerning Smilow. Since Smilow never moved to suppress, nor even remotely suggested to the court that a proper claim of taint was before it, we conclude that Smilow lacked just cause in refusing to answer questions at trial. Accordingly, the order of civil contempt against him is affirmed." 482 F.2d at 52.

The Court of Appeals opinion was handed down on June 26, 1973. On June 27, 1973 the criminal trial before Judge Bauman was reconvened. Both Huss and Smilow were again called as witnesses, again ordered to testify, and again refused. They were expressly warned that their conduct would lead to prosecution for criminal contempt. On June 28, 1973 Judge Bauman signed orders to show cause commencing the present criminal contempt proceedings.

The discovery materials now sought by defendants are completely outside the issues posed by the present criminal contempt proceedings. These materials relate to possible electronic and other surveillance, and would only be relevant on the questions of whether the Government obtained knowledge of defendants' identity through illegal means, and whether the proposed questioning of defendants

146

at the criminal trial was tainted -- all bearing on the ultimate issue of whether defendants had just cause for refusing to testify.

But these were matters which defendants either raised, or should have raised, in the civil contempt proceeding before Judge Bauman and in the appeal to the Court of Appeals, which resulted in the ruling of June 26, 1973. Defendants and their counsel were fully apprised of the possible problems regarding illegal wiretapping and the taint issue. They made their own strategic decisions about what they would or would not argue before Judge Bauman and the Court of Appeals.

At the session before Judge Bauman on June 8, 1973, prior to the appeal to the Court of Appeals, Huss's attorney argued that the Government had learned of Huss through illegal wiretaps and illegal pressure put on Sheldon Seigel (Tr. 135). When Huss himself was explaining the grounds for refusing to testify, he mentioned the problem of self-incrimination and the religious objections, but did not refer to illegal wiretapping or taint (Tr. 137). After Judge Bauman had signed the immunity order (Tr. 138-39), Huss's attorney again explained his client's objections to testifying, and referred only to the religious issue (Tr. 142-44). Still later, Huss reiterated his objections, and referred only to religion (Tr. 148-49).

Following Judge Bauman's announcement that Huss was in contempt of court, Huss's attorney stated that Huss would appeal to the Court of Appeals on both the religious issue and the question relating to taint (Tr. 155). However, Huss's brief on appeal made no mention of the taint question, and relied solely upon the religious contention. When the criminal trial resumed before Judge Bauman on June 27, 1973 after the ruling of the Court of Appeals, Huss's only objection to answering the questions was based on religious grounds. No mention was made at that time of illegal wiretapping or taint (Tr. 250).

With regard to Smilow, in the June 8, 1973 session before Judge Bauman, Smilow's attorney, upon learning that the wiretap tapes had been destroyed, asked that "on this basis alone" Smilow not be called as a witness (Tr. 180). Smilow's attorney also argued that the information which was the basis for the questioning of Smilow had been obtained from recordings made by Seigel (when wearing a wire recorder on his body), and that since Seigel was then acting as a Government informant, information obtained from such recordings was illegal (Tr. 182-83). Smilow, in explaining his refusal to answer questions, reiterated the latter argument, and stated other objections based upon claims of religious freedom and double jeopardy (Tr. 186-87). As the Court

of Appeals pointed out (482 F.2d at 52), Smilow did not argue before Judge Bauman that the questioning of Smilow had been tainted by illegal electronic surveillance carried out by the Government, and Smilow made no request for a taint hearing. It was clear, as the Court of Appeals held, that Seigel, not the wiretap, was the source of the Government's information concerning Smilow. The Court of Appeals concluded that Smilow had no valid basis for refusing to answer questions at the criminal trial.

At the renewed proceedings before Judge Bauman on June 27, 1973, Smilow's attorney applied for a hearing to determine whether the Government had overheard Smilow by means of illegal wiretaps. Judge Bauman denied this application (Tr. 268-270). Smilow's attorney also objected to the questioning of Smilow on a somewhat different taint theory. The argument was that the Government's information about Smilow's identity had come from Seigel, and the Government's information about Seigel had come from illegal wiretapping (Tr. 264-65). Judge Bauman overruled this objection.

Presumably Huss and Smilow now, on the criminal contempt actions, wish to put forward in expanded form the arguments which Smilow made for the first time before Judge Bauman following the decision of the Court of Appeals --

(169)

(1) that there should be a full evidentiary hearing to determine whether information about Huss and Smilow was obtained through illegal surveillance; and (2) that in any event the questioning of Huss and Smilow was derivatively tainted because the identity of Huss and Smilow was obtained from Seigel, whose identity was in turn obtained from illegal sources. But it is perfectly clear that these arguments were fully available to Huss and Smilow in the civil contempt proceedings before Judge Bauman and in the appeal to the Court of Appeals. These proceedings dealt with, and disposed of, the fundamental question of whether Huss and Smilow had any "just cause" for refusing to testify. 28 U.S.C. § 1826(a). The Court of Appeals ruled conclusively that Huss and Smilow had no valid basis for such refusals. Surely these defendants are not entitled to litigate this issue afresh. For these reasons the discovery requests of defendants for materials regarding surveillance are denied.

Defendants' motion to dismiss the contempt proceedings can be dealt with briefly. First, they contend that the grant of use immunity under 18 U.S.C. § 6002 was insufficient, because, by testifying truthfully at the criminal trial, they might have indicated the falsity of certain prior statements to Government agents, thus

(170)

exposing themselves to possible criminal prosecution for such false statements. Defendants refer to the language of Section 6002, providing that no testimony or information compelled under the immunity order may be used against the witness in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order". Defendants rely on In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973).

However, in Kastigar v. United States, 406 U.S. 441, 453 (1972), the Supreme Court held that the immunity provided by Section 6002 is coextensive with the scope of the constitutional privilege against self-incrimination. The thesis of the Baldinger case -- that testimony under an immunity order can be used as a basis for criminal prosecution for prior false statements, and that therefore the use immunity statute is not fully protective of the privilege against self-incrimination -- has been expressly rejected in at least two cases, which hold that Section 6002 permits prosecution only for perjury or other false statements made at or after the time of the granting of the immunity order. Application of the U.S. Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973); United States v. Doe, 361 F. Supp. 226 (E.D. Pa.), aff'd without opinion sub nom. Appeal of Calabrese, 485 F.2d 678 (3d Cir. 1973). The latter authorities appear to be correct.



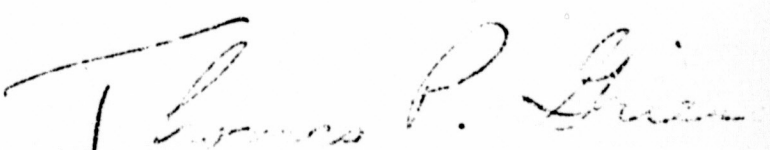
Defendants' request for disclosure of statements made by them to government agents is related to the above contention regarding the alleged failure of Section 6002 to protect them from prosecution for the possible falsity of such statements. Since I have rejected defendants' contention in this regard as a matter of law, there is no reason for the production of such statements, if there are any.

Defendants also move to dismiss the criminal contempt proceedings on the ground that the applicable statute and rule providing for criminal contempt -- 18 U.S.C. § 401 and F.R. Cr. P. 42 -- are unconstitutional in that there are no specified limits placed upon the punishment which can be imposed. Although the parties have not cited any authorities discussing this precise argument, it is clear that the Supreme Court has long recognized the validity of the criminal contempt power granted by the statute and rule. Green v. United States, 356 U.S. 165 (1958); Frank v. United States, 395 U.S. 147 (1969).

For the foregoing reasons, defendants' motions are denied in all respects.

So ordered.

Dated: New York, New York  
May 6, 1974

  
THOMAS P. GRIESA  
U.S.D.J.



MINUTES OF TRIAL

172

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

vs. : 73 Cr. Ms. 25  
73 Cr. Ms. 24

RICHARD HUSS and JEFFREY H. :  
SMILOW, :

Defendants. :

----- x

July 16, 1974,  
10 A.M.

Before:

Hon. Thomas P. Griesa,  
District Judge and a Jury.

Appearances:

Paul J. Curran, U.S. Attorney,  
For the government,  
By: Robert Cold, Assistant U.S. Attorney.

Paul G. Chevigny, Esq.,  
For the defendants.

1 eh

2 (In the robing room.)

3 MR. CHEVIGNY: Mr. Gold has chosen from Exhibits  
4 A and B to the order to show cause some portions and I consent-  
5 ed to his excisions much of which dealt with cutting out wire-  
6 tap material.

7 THE COURT: We are late so what is that he wants  
8 to do that you object to?

9 MR. CHEVIGNY: He wants to cut out pages 140  
10 through 148 which is chiefly an argument by Mr. Miller in which  
11 at the end of which the argument on page 144 Mr. Huss is asked  
12 by the court if that is the basis of his objection and Mr.  
13 Miller says that there is another ground and then on page 146  
14 the witness is asked if that is the basis and --

15 THE COURT: Wait a minute now. Mr. Gold wants to  
16 cut out pages 140 through 148, right?

17 MR. CHEVIGNY: Right. And I would like to keep them.

18 THE COURT: Why do you want to keep them? It is  
19 all about this legal argument between Mr. Miller who was then  
20 representing Huss and Judge Bauman about the argument made by  
21 Mr. Miller about Jewish law and Mr. Miller states that there  
22 are two grounds of Jewish law alleged as grounds for objecting  
23 to testifying: one, that by testifying under a grant of im-  
24 munity the witness has been granted a consideration or a re-  
25 ward for testifying against another Jew; secondly, that no

1 ebh  
2 court of law can even decide what the witness' obligations are  
3 because only a Jewish religious authority can do it. Is that  
4 right, basically?

5 MR. CHEVIGNY: Yes.

6 THE COURT: And this is all discussed, and this  
7 has nothing to do it seems to me with the issues in our case.  
8 which is really whether Judge Bauman ordered Mr. Huss and Mr.  
9 Smilow to testify and whether they understood his order, or  
10 whether they were mistaken about the order for some reason and  
11 whether they consciously disobeyed it. I don't understand  
12 why we have to have eight pages of colloquy about Jewish re-  
13 ligious law.

14 MR. CHEVIGNY: My point is --

15 THE COURT: Is there any part of that in which  
16 Judge Bauman directs an order to the defendant Huss?

17 MR. CHEVIGNY: At page 144 the reason that I  
18 would, that I seek to keep it is that the judge asks Mr. Huss  
19 if that is the basis of his objection, and he says it is, and  
20 the same thing occurs at 146 with relation to the second  
21 ground.

22 THE COURT: Those grounds are irrelevant to our  
23 case.

24 MR. CHEVIGNY: Well, as the issue here is intent,  
25 your Honor, it seems to me that the United States Attorney

1 ebh

2 has cut the case down or tried to cut the transcript down  
3 to the bare bones and as your Honor has ruled that the de-  
4 fendants can't testify as to their religious objection it seems  
5 to me that what's in the record with relation to their intent  
6 insofar as the religious defense affects their intent should  
7 be in.

8 THE COURT: I don't understand you. This gets  
9 to another point and that is the definition of knowingly and  
10 wilfully and I was going to get to that in a minute. But I  
11 would rule as a matter of law that Mr. Huss and Mr. Smilow  
12 have no defense whatever on the issue of intent or on any  
13 other issue based upon their private beliefs about alleged  
14 Jewish law. That is a question of law as to whether they can  
15 pose such a defense. Judge Bauman as a matter of law ruled  
16 on that. The Court of Appeals has ruled on that sufficiently  
17 clearly. I rule on it and I hold that as a matter of law  
18 these defendants have no defense whatever to this criminal  
19 contempt proceeding based on any theory or argument about  
20 Jewish law. It is irrelevant as a matter of law. It doesn't  
21 need to go to the jury in any form and so I would say that the  
22 eight or so pages of colloquy, even including those statements  
23 by Mr. Huss, have no reason to come in so I will hold that  
24 the government can keep them out.

25 Is there anything else?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

eth

MR. CHEVIGNY: No. We are clear on everything else.

THE COURT: I would like to ask you -- and we will go into this a little later -- this question of how to charge the jury on the meaning of knowingly and wilfully has given me a little problem.

The government has done what the United States Attorney's office so often does: they give me a charge in the abstract taken from the needs and circumstances of a completely different case, and they offer it as the charge in this case with not the slightest effort to apply it to this case.

You have given me a definition of knowingly and wilfully, Mr. Gold, and you give me a cite to some ancient civil case which has nothing to do with criminal contempt, some one or two criminal cases which have nothing to do with criminal contempt.

I think you have got to, yourself, or in your office, at least go through the mental exercise of trying to draft a charge that applies to this case.

What are the issues in this case? This is not a bank robbery case, or a stock case, or some other kind of case, and I think that this kind of boilerplate charge, if it is boilerplate, or whatever it is that you have given me would be of no utility to the jury at all.

ebh

1                   You say that an act is done knowingly if it is  
2 done voluntarily and purposely and not because of mistake,  
3 accident, mere negligence or other innocent reason. The jury  
4 might after those words say take on voluntary, was he acting  
5 voluntarily? Is that a helpful word to give the jury? Pur-  
6 posefully? Is that a helpful word in this case? He wasn't in  
7 there doing anything voluntarily. Purposely? His purpose  
8 was to carry out the dictates of Jewish law. Mistake? Is  
9 that a helpful word to give to the jury? The jury could easily  
10 say "Well, he mistakenly believed that he was entitled not  
11 to testify because some private motive or belief of his."  
12

13                   None of these words is going to help the jury  
14 solve our case. They may be helpful in a narcotics case or  
15 a bank robbery case but they are not helpful in this case.

16                   I have the same problem with Mr. Chevigny's charge  
17 although a little different problem. You want me to charge  
18 that specific intent to violate the law is necessary. Now  
19 that's taken from the form book, and I think the language is  
20 in there but when you get into the annotations to that there  
21 is a different kind of case, and I can see what you want to  
22 accomplish. From my point of view that would mislead the  
23 jury. That would not be legally correct here because it would  
24 permit the jury to let the defendants off solely if they  
25 found that they had some or they lacked a purpose to violate



1 ohh

2 the law.

3 What I think both of you have got to figure out  
4 is what a proper charge is in this case. How do you instruct  
5 the jury in some sense I believe rational manner which will  
6 convey to them the precise issue they are supposed to decide  
7 in this case, and I would think frankly the question is simply,  
8 did the defendants understand Judge Bauman's order or orders, and  
9 did they consciously decide to obey, to disobey those orders?  
10 To me that's the beginning and the end of it. But before I  
11 charge I want from both of you a redraft of the charge apply-  
12 ing to the issues in this case and telling the jury what are  
13 the specific, precise issues they will have to determine in  
14 this case, and Mr. Chevigny, you may disagree with my ruling  
15 on the law but within my rulings on the law I need to have  
16 a proposed charge from you to give to the jury. It doesn't  
17 waive your legal arguments about religious motives and so forth  
18 but I have got to have a helpful charge. All right, let's go  
19 out.

20 (In the courtroom. Jury present.)

21 THE COURT: Ladies and gentlemen, let me outline  
22 the course of the trial briefly.

23 The government, the Assistant United States  
24 Attorney, will make an opening statement and explain to you  
25 what it expects to prove.



1 ebh

2 The defense attorney is entitled to make an open-  
3 ing statement but he is not required to do so. The entire  
4 burden of proving the case and explaining the case is on the  
5 government.

6 I think that the defendant is not required to make  
7 an opening statement, defense counsel.

8 Now, whether the one statement or two statements  
9 are made, one point that you should remember is that those  
10 statements, like any argument of the lawyers or statements  
11 by the court, aren't evidence; they are arguments intended  
12 to help you understand what each side thinks the evidence  
13 shows or doesn't show, but the statements of the lawyers,  
14 the statements that I make as the judge, aren't evidence.

15 The evidence in this case will consist entirely  
16 or almost entirely of the transcripts of what happened before  
17 Judge Bauman. You will hear that and the written transcripts  
18 I assume will be available for you to read during your delibera-  
19 tions if you want to read those transcripts, but the evidence  
20 in this case will consist solely or almost entirely of the  
21 stenographic transcripts of the questions that were asked of  
22 Mr. Huss and Mr. Smilow in the criminal case before Judge  
23 Bauman, the responses to those questions by each defendant  
24 basically declining to answer, and the orders of Judge Bauman  
25 and the responses to those orders. You will hear all that.

1 cbh

2 Anyway, that is the evidence.

3 The government will introduce its evidence in  
4 the form I have described to you, and at the conclusion of that  
5 evidence the defendants have a right to introduce evidence on  
6 their behalf but they are not required to do so.

7 At the conclusion of all the evidence, the at-  
8 torneys will make their summations as to what they believe the  
9 the evidence has or has not proved.

10 Now, the law which applies to this case is what  
11 I will lay down by way of instructions and rulings during the  
12 course of the trial. There probably won't be many problems  
13 in the way of rulings on evidence. In a normal trial, as you  
14 know, there are usual objections at various times to the in-  
15 troduction of evidence. There is probably very little need  
16 for that here but to the extent that there is that's my job  
17 and you are not concerned with those rulings on matters of  
18 evidence and procedure.

19 At the conclusion of the trial and during the  
20 trial I will instruct you on the law at various times and it  
21 is your duty to follow those instructions and apply those  
22 instructions whether you personally may agree with them or  
23 not. That is your sworn job in this trial.

24 Now, as I think you already know from the question-  
25 ing and the statements that have already been made, that the

1 ebh

2 basis for deciding this case is the law and the evidence.

3 not be influenced in any degree by personal feeling,  
4 any inflamed feeling for or against any party, any sympathetic  
5 feeling for or against any party. You have got a duty to obey  
6 the law here and carry on the legal instructions and listen to  
7 the evidence. That is your sworn duty to do that. And if the  
8 trial was to be governed by emotion, prejudice, personal feel-  
9 ings of any kind, we wouldn't need to have a trial. We wouldn't  
10 need to have a court of law.

11 As I said to you yesterday, until this case is  
12 finally submitted after the evidence is in, and after I have  
13 instructed you on the law, and when you start your official  
14 deliberations, before that time you are to engage in no dis-  
15 cussion whatever in any way about the case, the issues, the  
16 personalities, whether it is in the lunchroom, the hallway,  
17 the elevator or any other place. There is to be no informal  
18 piecemeal discussion in the case among yourselves or with  
19 anybody else, family or friends. I am confident the case  
20 will conclude today but if for any reason during the day or  
21 if it should go overnight, if you should see anything in the  
22 press, television or radio, or hear anything, you are to im-  
23 mediately avoid it.

24 All right. Mr. Gold, you may make your opening  
25 statement.



1       ebh

11

2                   MR. GOLD:    Your Honor, Miss Carey, Mr. Chevigny,  
3       madam forelady and ladies and gentlemen of the jury. As all  
4       of you now know this is a federal criminal case in which the  
5       defendants Richard Huss and Jeffrey Smilow who are seated  
6       right over here are each charged with criminal contempt of  
7       court for knowingly, wilfully, deliberately and understandingly  
8       refusing to obey an order issued by a federal judge in this  
9       court. That order required each of these defendants to testify  
10      as a government witness at a criminal trial held in this court-  
11      house a little more than a year ago.

12                   As Judge Griesa has already told you, my name is  
13      Robert Gold. I am an Assistant United States Attorney and  
14      I will be presenting to you the evidence in this case. Seated  
15      with me at counsel table is Robert Wittaker. He is a law  
16      student and he is working in the United States Attorney's  
17      office as a summer assistant.

18                   The essential charge in this case is that a little  
19      more than a year ago the defendants were each called to testify  
20      at a criminal trial entitled United States of America v.  
21      Stuart Cohen and Sheldon Davis. And as his Honor has told you  
22      yesterday, that case arose from a fire bombing which occurred  
23      on January 26, 1972. That fire bombing occurred at the offices  
24      of Columbia Artists Management and Hurok Concerts Incorporated,  
25      both here in New York City.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

Unfortunately a secretary by the name of Iris Cohen was killed in the explosion.

On June 8, 1973, at that trial, Richard Huss and Jeffrey Smilow were called to the witness stand and the clerk administered the oath. The government prosecutor, a Mr. Jaffe by name, put questions to each of the defendants concerning the facts of the fire bombing. Each defendant refused to answer.

Each of the defendants asserted his privilege against self-incrimination as the ground upon which he refused to answer.

Now what would he mean by asserting the privilege against self-incrimination. Very simply this: Each of the defendants refused to answer the questions put to him claiming that if he answered those questions his testimony would be damaging, it would tend to incriminate him and the government might be able to prosecute him on the basis of his testimony.

At that point in the trial, at the government's specific request -- Judge Bauman, who was presiding at the trial, granted each defendant what we call immunity. And what do we mean by the term immunity. There is nothing magical about the term. In plain everyday talk it means nothing more than this: once a judge gives a witness immunity, the

1       cbh  
2       witness must testify, and the government is absolutely pre-  
3       vented from using anything that witness says against him  
4       in any respect whatsoever. It is an absolute guarantee that  
5       you cannot be prosecuted on the basis of anything you said.

6               And so, ladies and gentlemen, whether the de-  
7       fendants Huss and Smilow told Judge Bauman that they refused  
8       to answer the questions put to them on the ground that their  
9       answers might tend to incriminate them and lead to their  
10      prosecution, Judge Bauman gave them both immunity, an absolute  
11      guarantee that they couldn't be prosecuted on the basis of  
12      anything they said.

13             The evidence will show that even after Judge  
14      Bauman granted each defendant immunity, he then ordered each  
15      defendant to answer each and every question put to him con-  
16      cerning the facts of the fire bombing.

17             Nonetheless, the defendants each refused to  
18      answer. They refused to answer despite this grant of immunity  
19      and despite Judge Bauman's repeated orders to testify.

20             What happened then? Judge Bauman held each of the  
21      defendants in civil contempt. Civil contempt is very different  
22      from the charge before you this morning, which is criminal  
23      contempt.

24             Judge Bauman at that time carefully advised each  
25      of the defendants that if they continued to refuse to testify,



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh 14  
if they continued to deny his clear order to testify,  
each defendant would subject himself to prosecution for  
criminal contempt.

All of this occurred, you will recall, on  
June 8, 1973.

After they were held in civil contempt, each of  
these defendants took his case to a higher court, and in  
this case it was the United States Court of Appeals. On  
June 26, 1973, the United States Court of Appeals rendered  
its decision. It affirmed Judge Bauman's judgment of civil  
contempt against both of these defendants and held, in  
effect, that both of these defendants had no legal justi-  
fication whatsoever for refusing to testify and to deny  
Judge Bauman's order.

The matter did not stop there.

THE COURT: Remember these are laymen. You used  
the term civil contempt. You better define it. If you  
don't, I will. What is meant by civil contempt. You better  
define it. If you don't, I will. What is meant by civil  
contempt. I think you better explain it.

MR. GOLD: I would be delighted to, your Honor.

Ladies and gentlemen, civil contempt is a remedy  
by which the court attempts to compel a defendant to comply  
with a court order. Whether a defendant or a witness is



ebh

15

held in civil contempt, in common language we say that the person held in civil contempt holds the keys to the courthouse, to the jail house. Any time he chooses to answer the questions put to him, he can immediately be released from custody, answer the questions and go free. That is very different from criminal contempt. Criminal contempt I will explain to you in a few minutes works very differently.

Now after the Court of Appeals rendered its decision on June 26, 1973, the following day both of these defendants were recalled to the stand. They were given another chance to comply with Judge Bauman's order.

However, as the evidence will show this morning, neither defendant changed his position. They both continued to refuse to testify. Judge Bauman gave them very careful warnings that if they continued to defy his order to testify, they would then subject themselves to criminal contempt of court.

What was the result of Judge Bauman's warnings? You will hear this morning absolutely nothing. Both of these defendants refused to testify.

At that point the government prosecutors told Judge Bauman that without Mr. Huss and Mr. Smilow as witnesses the government couldn't proceed with the fire bombing trial and, in fact, the trial was terminated. And

1 ebh

2 both Mr. Huss and Mr. Smiley are on trial before you this  
3 morning.

4 Now, in the course of that trial we will prove to  
5 you that Mr. Huss and Mr. Smilow knowingly and wilfully  
6 refused time and time and time again to obey Judge Bauman's  
7 very carefully worded order and to listen to his very care-  
8 fully worded warnings.

9 The way we are going to do that is this: we are  
10 going to offer in evidence the actual stenographic transcript  
11 from that trial, and through the assistance of a witness  
12 we are going to read together the exact words that were spoken  
13 at that trial. You will hear the very words that were spoken  
14 by Judge Bauman, by each of these defendants, by the prose-  
15 cutors and in some instances by the defense lawyers.

16 That in a nutshell is the government's case. As  
17 you can see, it is a relatively simple and straightforward  
18 case. But that doesn't mean for one minute that it is not  
19 a terribly important case. It is obviously terribly im-  
20 portant to each of these defendants who are charged with a  
21 terribly serious federal crime. It is equally important to  
22 the government whose responsibility it is to enforce the  
23 laws enacted by Congress and to attempt to maintain the  
24 integrity of our court system.

25 Accordingly I urge you to give this case your very

1 ebh

2 careful consideration. I trust that if you do that and  
3 follow his Honor's instructions on the law, at the end of  
4 the case, when all of the evidence is in, you will find  
5 both defendants guilty as charged.

6 Thank you.

7 THE COURT: Mr. Chevigny, as I understand it you  
8 are going to waive your opening, is that right?

9 MR. CHEVIGNY: Yes, your Honor.

10 THE COURT: Could I see counsel up here for just  
11 a minute, please.

12 (At the side bar.)

13 THE COURT: I permitted you to exclude the colloquy  
14 about the religious ground but I would assume that other  
15 parts of the material that is in that it does appear that  
16 there were religious objections made.

17 MR. GOLD: That's correct.

18 THE COURT: Well, it seems to me that you didn't--  
19 I think that it is a little confusing to the jury at best  
20 and I think that you better tell them or else I can do it  
21 right now, that certain grounds -- it is such a naked kind  
22 of presentation at this point and the jury is going to hear  
23 all this about the religious grounds and they are going to  
24 wonder what the positions are about it and I will give you  
25 at least the opportunity to explain what your position is on



1 ebh  
2 that if you want to do it so that the jury knows what is  
3 coming.

4 MR. GOLD: Did your Honor offer a moment ago  
5 to do that? If your Honor is going to do that--

6 THE COURT: I think this is your job.

7 MR. GOLD: I would be delighted to.

8 MR. CHEVIGNY: I respectfully except. His position  
9 on the law is an opening for what he intends to prove.  
10 He doesn't intend to prove anything about a religious defense.  
11 Therefore I would except. I don't think it is a proper opening.

12 THE COURT: But the way he has presented it is  
13 simply that there was just an order by Judge Bauman and a  
14 naked refusal. Now, the jury has got to listen to this  
15 and they are going to hear about religious objections, and  
16 double jeopardy objections and so forth. The only one he  
17 touched on is the constitutional privilege against self-  
18 incrimination objection. I am not trying to do the govern-  
19 ment's case for it but I just don't want this jury to sit  
20 around and get confused needlessly, and it seems to me that  
21 I would be perfectly glad to give the government the op-  
22 portunity to simply give the jury a forecast of the problems  
23 coming up fully and say what the government's position is  
24 on that and they will get the legal instruction at the end.  
25 You can amplify it.

1 ebh

2 MR. GOLD: I don't mean to put questions to the  
3 court but I want to make sure that ends the thrust of your  
4 Honor's direction. I would be delighted to do that but I  
5 want to make sure I do with the full understanding. I  
6 was confident that when we read from the transcripts re-  
7 sponsively through my first witness it would become clear  
8 that each time a ground for refusal was raised by these  
9 defendants Judge Bauman explained that that was not a valid  
10 ground. I was concerned that had I put that in my opening  
11 the jury would be led to believe that that was the govern-  
12 ment's claim, that that was not a valid ground as opposed.

13 THE COURT: All right. Why don't you?

14 MR. GOLD: I didn't mean to confuse the jury.  
15 I am sorry if your Honor feels that I have.

16 THE COURT: Nobody means to confuse the jury.  
17 If you feel that's the better course as far as the government's  
18 case is concerned, why don't you let it rest there.

19 MR. GOLD: I would like to, your Honor. I am hope-  
20 ful that if your Honor feels we have to clear it up I can do  
21 so on summation.

22 THE COURT: All right. Thank you.

23 (In open court.)

24 MR. GOLD: Your Honor, at this time the government  
25 would offer in evidence a stipulation entered into between



1     ebh  
2     counsel for the defense and counsel for the government. It's  
3     been previously marked Government's Exhibit 5.

4             MR. CHEVIGNY: No objection.

5             THE COURT: All right, Government's Exhibit 5 is  
6     received.

7             (Government's Exhibit 5 received in evidence.)

8             MR. GOLD: With your Honor's permission I would  
9     like to read it to the jury.

10            THE COURT: You may.

11            MR. GOLD: Government's Exhibit 5 reads as  
12    follows:

13            "It is hereby stipulated and agreed by and  
14    between defendants Richard Huss and Jeffrey Smilow by their  
15    attorney Paul Chevigny, Esq. and the United States of America  
16    by its counsel, Paul J. Curran, the United States Attorney  
17    for the Southern District of New York, Robert Gold, Assistant  
18    United States Attorney of counsel, that if called as a  
19    witness at the trial herein, the appropriate court reporter  
20    on the staff of the Southern District Court Reporters would  
21    testify essentially as follows:

22            "1. That he was the court reporter who prepared  
23    the stenographic minutes during the trial of United States  
24    v. Stuart Cohen and Sheldon Davis, 73 Cr. 778 which commenced  
25    in this courthouse on May 30, 1973, and terminated on or



1       ebh

2       about June 27, 1973.

3               "2. That he has examined the transcript of the  
4 stenographic minutes taken during the course of the said  
5 trial.

6               "3. That Government's Exhibit 1, 1A, 1B, 1C  
7 and 1D are accurate copies of portions of the stenographic  
8 transcript of the testimony given by Richard Huss on or  
9 about June 8, 1973.

10              "4. That Government's Exhibits 2A, 2B, and 2C  
11 are accurate copies of portions of the stenographic transcript  
12 of the testimony given by Jeffrey Smilow on or about June 8,  
13 1973.

14              "5. That Government's Exhibit 3 is an accurate  
15 copy of a portion of the stenographic transcript of  
16 testimony given by Richard Huss on or about June 27, 1973.

17              "6. That Government's Exhibits 4A and 4B are  
18 accurate copies of portions of the stenographic transcript  
19 of testimony given by Jeffrey Smilow on or about June 27,  
20 1973."

21              Dated New York, New York, July 15, 1974.

22              Your Honor, at this time we would offer the  
23 transcripts referred to in the stipulation. Mr. Chevigny  
24 has a copy as does the court.

25              THE COURT: All right.

1 ebh

Gross-direct

2 MR. GOLD: At this time the government offers  
3 Government's Exhibits 1, 1A, 1B, 1C, 1D, 2A, 2B, 2C, 3, 4A  
4 and 4B.

5 THE COURT: 1, 1A, 1B, 1C and 1D, and 2A, 2B and  
6 2C.

7 MR. GOLD: Yes, your Honor.

8 THE COURT: 2A, 2B, 2C.

9 MR. GOLD: That's correct. 3, 4A and 4B.

10 THE COURT: Received.

11 (Government's Exhibits 1, 1A, 1B, 1C, 1D, 2A,  
xx 12 2B, 2C, 3, 4A and 4B received in evidence.)

13 THE COURT: I take it there was no objection.

14 MR. CHEVIGNY: No objection.

15 THE COURT: All right.

16 MR. GOLD: Your Honor, at this time the government  
17 calls its first witness, John Gross.

18  
19 J O H N G R O S S, called as a witness, having been  
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. GOLD:

23 Q Mr. Gross, would you tell us how you are employed,  
24 please?

25 A I am an Assistant United States Attorney in this

1 ebh Gross-direct  
2 district.

3 Q Did you have any connection whatsoever with the  
4 trial of United States against Stuart Cohen and Sheldon  
5 Seigel in the summer of 1973?

6 A No, sir.

7 Q Mr. Gross, I am now placing before you certain  
8 stenographic transcripts that have been received in evidence  
9 and I ask you to be good enough to read with me, and I ask  
10 you specifically to read the part of the witnesses Richard  
11 Huss and Jeffrey Smilow as the case may be.

12 MR. GOLD: Your Honor, I am beginning to read  
13 from Government's Exhibit 1 which reads as follows:

14 "United States of America v. Stuart Cohen, Sheldon  
15 Davis and Sheldon Seigel before the Honorable Arnold  
16 Bauman, District Judge, New York, June 8, 1973, 10:30 A.M.  
17 Trial resumed." Mr. Jaffe recalls Mr. Huss.

18 MR. GOLD: That's correct, your Honor.

19 THE COURT: Representing the government in that  
20 criminal action. Okay.

21 MR. GOLD: Now reading from Government's Exhibit  
22 1A beginning at line 23:

23 "Richard Huss called as a witness by the government  
24 duly affirmed by the clerk of the court, testified as  
25 follows:" Reading from Government's Exhibit 1B. Commencing

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

at line 4.

"Direct Examination By Mr. Jaffe:

"Q Would you state and spell your name, please?

"A Richard Huss.

"Q Will you tell us where you live?

"A 5 Staten Island Boulevard.

"Q Would you tell us your age?

"A I decline to answer this series of questions on the ground that my testimony may tend to incriminate me. Also, it is my understanding of the Jewish law that I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish law made binding on me is itself a further violation of basic Jewish law.

"Mr. Jaffe: Your Honor, at this time we would hand up to the court an application we attempted to file last week with regard to immunity from Mr. Huss. I will hand a copy of that application to Mr. Miller and I will hand to the court a letter, the original of a letter from Henry E. Peterson, Assistant Attorney General, authorizing the United States Attorney to make that application."

Now reading from Government's Exhibit 1C at line 15 by Mr. Jaffe:

"Q Mr. Huss, directing your attention to January 26,

1 ebh

2 1972, specifically to the morning of that day, did you  
3 see the defendants Stuart Cohen and Sheldon Davis on that  
4 day?

5 "The Court: Before you answer that question,  
6 Mr. Huss, I want to explain to you that I have just signed  
7 an order which confers immunity on you and which prevents  
8 the use of anything you say against you. I am going to  
9 give you a moment or as much time as you like, Mr. Huss,  
10 to talk to your lawyer so that he can explain to you the  
11 legal significance of what I have done in signing this  
12 order I have just signed. You may step down.

13 "Mr. Jaffe: Your Honor, before the witness steps  
14 down, would the court also admonish the witness that it is  
15 the court's opinion that the other basis stated for refusal  
16 to answer, specifically the religious grounds, is not a  
17 valid basis and that he consult about that.

18 "The Court: Yes, Mr. Huss. Your lawyer knows  
19 the case of United States v. Smilow, I have no doubt, but  
20 another judge of this court has ruled upon the same objection  
21 in that case of Mr. Smilow and has held it to be not a valid  
22 ground for refusal to answer. The substance of what I have  
23 said is that I agree with the ruling of that judge, Judge  
24 Weinfeld by name. With respect to the claim based upon  
25 religious scruples and advise you that it is not a proper

1 ebh

2 basis on which you may refuse to answer."

3 Now reading from Government's Exhibit 1D.

4 "The Court: The objection based on religious  
5 grounds is overruled.

6 "Mr. Miller: I except."

7 THE COURT: You haven't said who Mr. Miller is.

8 MR. GOLD: Mr. Miller is one of the defense  
9 lawyers.

10 THE COURT: Who was representing Mr. Huss at that  
11 time, was he not?

12 MR. GOLD: Yes.

13 THE COURT: Again, Mr. Jaffe was the government  
14 lawyer, Mr. Miller was representing Mr. Huss at that time,  
15 and when it says the court, when the stenographer takes  
16 down those minutes at trials, when the judge is speaking  
17 they say the court, and that meant Judge Bauman. Okay.

18 MR. GOLD: Commencing reading at line 5.

19 "The Court: I would like you to talk to your  
20 client, please, and explain to him-- You may step down, Mr.  
21 Huss-- the significance of the order I have just signed.

22 "Mr. Jaffe: Shall we proceed with Mr. Smilow?

23 "The Court: We will take a five-minute recess  
24 because I want counsel to have an opportunity to talk to his  
25 client.



1 ebh

2 "(Recess.)"

3 Commencing at line 18, examination by Mr. Jaffe.

4 "Q Mr. Huss, directing your attention to the morning  
5 of January 26, 1972, did you see Sheldon Davis on that  
6 morning?

7 "A I respectfully decline to answer this series of  
8 questions on the grounds that it is my understanding of  
9 Jewish law I am prohibited from testifying against another  
10 Jew in a non-Jewish tribunal and on the grounds that any  
11 contrary interpretation of Jewish law made against me is  
12 a further violation of the Jewish law.

13 "The Court: Do you understand I have overruled  
14 that objection.

15 "The Witness: Yes, your Honor.

16 "The Court: All right.

17 "By Mr. Jaffe:

18 "Q Mr. Huss, on the morning of January 26, 1972,  
19 did you drive in a car with Sheldon Davis and other people  
20 from Brooklyn into Manhattan?

21 "A I respectfully decline to answer.

22 "The Court: You may say same declination.

23 "The Witness: Yes, your Honor.

24 "The Court: You decline to answer on the same  
25 ground.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

"The Witness: Yes, sir.

"Mr. Jaffe: Would you order the witness to answer that?

"The Court: I order you to answer the question, Mr. Witness.

"The Witness: Same declination.

"Q Mr. Huss, on the morning of January 26, 1972, did you have a discussion with Mr. Davis and other individuals concerning the placement of an attache case at the premises of either Hurok Concerts Incorporated or Columbia Management Artists Incorporated?

"Mr. Slotnick: I object to it if the Court please.

"The Court: Overruled. You may answer.

"The Witness: Same declination.

"The Court: I order you to answer.

"The Witness: Same declination."

THE COURT: When he says same declination it simply means that he declines to answer for the reasons previously given.

"Mr. Gold: Question by Mr. Jaffe.

"Q Mr. Huss, on the morning of January 26, 1972, did you go with an individual named Jerome Kraut also known as Jerry Celler, to the offices of Hurok Concerts and

1       cbh

2       there place an attache case and ignite it?

3               "The Court: Go ahead.

4               "Q    Would you answer that question, Mr. Huss?

5               "A    Same declination.

6               "The Court: I order you to answer, Mr. Huss.

7               "The Witness: Same declination.

8               "Q    Were you at any time on the morning of January 26,  
9       1972, in the company of Sheldon Davis, Jerome Zellerkraut,  
10      also known as Jerry Celler, and an individual named Murray  
11      Elbogen?

12              "A    Same declination.

13              "The Court: Overruled. You may answer.

14              "A    Same declination.

15              "The Court: I order you to answer, Mr. Huss.

16              "A    Same declination.

17              "Q    Mr. Huss, prior to January 26, 1972 -- within  
18      a period of time from about two weeks before that date, that  
19      is, from two weeks before January 26, 1972, through  
20      January 26, 1972, did you have any discussions with Sheldon  
21      Davis or Stuart Cohen or with the individuals Murray El-  
22      bogen, Jeffrey Smilow or Jerome Zellerkraut concerning  
23      placement of any attache cases or incendiary devises at  
24      either Hurok Concerts Incorporated or Columbia Artists  
25      Management?

1 ebh

2 "The Court: I understand that. I don't regard  
3 this as a charade at all. He is asking questions that  
4 bear on the allegations of the indictment. The witness  
5 has consistently refused to answer and is heading in the  
6 direction of a contempt and I shall deal with that at the  
7 appropriate time."

8 Continuing on line 9 of the next page.

9 "The Court: You may answer.

10 "A Same declination.

11 "The Court: I order you to answer.

12 "A Same declination.

13 "The Court: I don't really see much point in  
14 going on.

15 "Mr. Jaffe: We were going to inquire whether it  
16 was his intention to give the same declination if other  
17 questions were put to the witness.

18 "The Court: You may answer that.

19 "A Yes.

20 "Mr. Jaffe: At this time we would ask that the  
21 court make the finding that Mr. Huss is in contempt of this  
22 court and ask that he be remanded to the custody of the  
23 Attorney General until such time during this proceeding  
24 that he be recalled and give testimony before this court.

25 "The Court: Before you say anything, I will hear

1 ebh

2 you, of course, Mr. Huss. I find you in contempt of this  
3 court. There are two kinds of contempt that I want to  
4 tell you about. One is civil contempt which provides for  
5 your incarceration during the course of this proceeding  
6 but leaves the keys to the prison with you in that if you  
7 decide to answer at any time, you will be released.

8 The second kind of contempt is a criminal contempt  
9 which does not look for answer but is meant as punishment  
10 for your contemptuous conduct in refusing to answer questions  
11 I instruct you, sir, that a civil contempt does not exclude  
12 criminal contempt. I find the witness in contempt of court.

13 Your Honor, I am now going to begin reading from  
14 Government's Exhibit 2A. At line 21, Jeffrey Smilow, called  
15 as a witness by the government, being affirmed, testified  
16 as follows: reading from Government's Exhibit 2A at line 12.  
17 "Direct Examination

18 By Mr. Jaffe:

19 "Q Mr. Smilow, would you tell us your age, sir?"

20 THE COURT: This was the June 8, 1973, trial?

21 MR. GOLD: That's right.

22 THE COURT: The same date as the material you  
23 read just now?

24 MR. GOLD: That's correct, your Honor.

25 THE COURT: Okay.

1 ebh

2 "Q Mr. Smilow, would you tell us your age, sir?

3 "A 18.

4 "Q I dcn't hear you.

5 "A 18.

6 "The Court: He said 18."

7 Line 5 of the next page by Mr. Jaffe.

8 "Q Mr. Smilow, directing your attention to January 26,  
9 1972, did you, on that day, during the morning, see Sheldon  
10 Davis or Stuart Cohen?

11 "A I refuse to answer on the ground that to require  
12 me to respond to the question would violate my constitutional  
13 right of freedom of worship as a committed and observant  
14 Jew under the First Amendment to the Constitution and that  
15 to compel me to answer said question would violate my right  
16 of freedom of worship as a committed and observant Jew in  
17 that under traditional Jewish law I didn't testify in any  
18 case where I am to receive an advantage or benefit because  
19 of my testimony against individuals. I refuse to answer  
20 the question on the ground that I presently am charged with  
21 committing on January 26, 1972, at about 9:25 A.M. at  
22 165 West 57th Street, New York, a crime of arson. I refuse  
23 to answer on the ground that to require me to respond to  
24 the question would violate my right to remain silent."

25 My copy is not clear here, Mr. Gold.



1 ebh

2 I will go back about a half a line about the  
3 court's permission.

4 "I refuse to answer on the ground that to require  
5 me to respond to the question would violate my right to  
6 remain silent which is guaranteed under the First Amendment  
7 of the United States Constitution.

8 "I respectfully refuse to testify against myself.  
9 I further refuse to testify on the basis that the government  
10 obtained information illegally by allowing the co-defendant  
11 to act as an informant and to participate in taped conver-  
12 sations with me.

13 I further respectfully refuse to answer on the  
14 basis that I have already been put in jeopardy for the same  
15 proceeding and I have been already punished although that  
16 proceeding was dismissed.

17 "MR. GOLD: With regard to the witness  
18 refusal to testify against himself, the government  
19 in its application to grant immunity to the witness.

20 "We hand up to the court the original application  
21 and copies of the original letters and we hand a copy of the  
22 immunity application to his attorney, Mr. Slotnick, one of  
23 the defense attorneys.

24 "MR. SLOTNICK: May defense have a copy of that,  
25 your Honor?

1 ebh

2 "MR. JAFFE: I will hand a copy to defense counsel  
3 so they both may take a look at that, your Honor.

4 "MR. SLOTNICK: Thank you, Mr. Jaffe."

5 THE COURT: There is a blank in the date of filing  
6 in the order.

7 "MR. JAFFE: That was originally filed on the 31st. "

8 "THE COURT: Are the original exhibits legible?  
9 My copy has some lines missing and apparently Mr. Gross'  
10 copy does. Now, if given to the jury it's got to be legible.

11 MR. GOLD: I will see to it that the copy given  
12 to the jury is legible.

13 THE COURT: All right.

14 MR. GOLD: "THE COURT: On May 31st.

15 "MR. JAFFE: That's correct.

16 "THE COURT: Mr. Smilow, I have just signed an  
17 order that confers upon you immunity against the use of  
18 anything that you are required to testify to in this  
19 courtroom. Do you understand that?

20 "THE WITNESS: I understand.

21 "THE COURT: Do you want a reasonable time to  
22 talk to your lawyer about the significance of the order I  
23 have just signed?

24 "THE WITNESS: No.

25 "THE COURT: The witness says no. Go ahead.

1 ebh

2 "MR. SLOTNICK: Your Honor, for the record, my  
3 silence should not be an indication of approval other than  
4 I am just constrained to act under your Honor's prior ruling.

5 "THE COURT: I understand. Yes. You have a con-  
6 tinuing objection to these proceedings, both of you.

7 "MR. JAFFE: Your Honor, with regard to the other  
8 basis raised by the witness with regard to his religious  
9 objection, the religious objection is almost in haec verba.  
10 The statement he made before the grand jury which was  
11 subsequently made before Jude Weinfeld and determined to be  
12 insufficient. Affirmed by the Second Circuit in the first  
13 Smilow case by Judge Feinberg and we would ask the court  
14 to instruct the witness with regard to his religious bases  
15 that in fact he has no religious basis on which he may decline  
16 to answer questions under the First Amendment.

17 "THE COURT: Yes. You understand that so far as  
18 your assertion of a privilege, whether it be constitutionally  
19 based or religiously based, I do not find that that is an  
20 appropriate reason for refusing to answer proper questions,  
21 and I should direct you to answer such questions as I deem  
22 proper."

23 Continuing at line 23.

24 "THE COURT: I think the record should indicate  
25 that I addressed to the witness a statement that immunity

1 ebh

2 has been pursuant to the authorities set forth in Title 18,  
3 United States Code, Section 6003.

4 "MR. JAFFE: With regard to his other basis for  
5 refusing to testify.

6 "THE COURT: Just a moment. 6002 is the order  
7 that I made. In any event, you understand that now immunity  
8 has been conferred upon you, do you not?

9 "THE WITNESS: Yes.

10 "MR. JAFFE: With regard to his other basis, your  
11 Honor, the witness refuses to answer based on two assertions:  
12 One, that he has been placed in double jeopardy in that  
13 on a previous occasion he was held in contempt for refusing  
14 to testify. We ask the court to instruct him that that is  
15 an insufficient basis for refusing to now testify before  
16 a hearing held in front of the court.

17 "THE COURT: I so instruct the witness.

18 "MR. JAFFE: With regard to his refusal to answer  
19 based on the discovery of this witness by the existence  
20 of tapes which led to the discovery of the witness Sheldon  
21 Seigel, we would ask the court to instruct him that that  
22 too is no basis on which he may refuse to testify.

23 "THE COURT: Yes. The witness is so instructed."

24 Examination by Mr. Jaffe at line 23.

25 "Q Mr. Smilow, directing your attention to January 26,

1 ebh

2 1972, did you on that date meet with Sheldon Davis and  
3 with Murray Elbogen, Jerome Zellerkraut and Richard Huss.

4 "THE COURT: You need not read the entire thing  
5 Mr. Smilow. You may say same declination if that is what  
6 you want to do.

7 "THE WITNESS: Same declination.

8 "MR. PUTZEL: I didn't hear the answer.

9 "THE COURT: He said same declination.

10 "MR. JAFFE: Would the court direct the witness  
11 to answer that question.

12 "THE COURT: I order you to answer that question.

13 "THE WITNESS: Same declination."

14 Question by Mr. Jaffe.

15 "Q Mr. Smilow, when did you, prior to January 26,  
16 1972, have any conversations with Stuart Cohen or Sheldon  
17 Davis concerning your agreement with them to take an attache  
18 case to the premises of Columbia Artists Management In-  
19 corporated, to there ignite a fuse contained in that attache  
20 case and in fact on the 26th --

21 "THE COURT: Mr. Jaffe, don't tell a story.  
22 Just read a lawyerlike question please.

23 "MR. JAFFE: Let me withdraw the question.

24 "Q Prior to January 26, 1972, did you have a  
25 conversation or conversations with Sheldon Davis and with

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

Stuart Cohen concerning your involvement in going to  
Columbia Artists Management?

"A Same declination.

"THE COURT: I order you to answer, sir.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q As a result of that conversation or any conver-  
sations, did you, on the 26th of January, 1972, go with  
certain individuals in a car from Brooklyn to Manhattan?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same.

"Q Did you on the 26th of January, 1972, go with an  
individual to the premises of Columbia Artists Management?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"THE COURT: I think that is enough, Mr. Jaffe.

Why don't you ask him one question to the effect as to  
whether or not he intends to decline on those grounds."

Now reading from Government's Exhibit 2C at line  
5. Question by Mr. Jaffe.

"Q Directing your attention to the month of June,  
1972, Mr. Smilow, did you have any conversations with Sheldon



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

Seigel?

"A Same declination.

"THE COURT: What did you say?

"THE WITNESS: Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q Mr. Smilow, is it your intention that to any other questions that I put to you, that you will give the same declination and refuse to answer?

"MR. SLOTNICK: I object to that, your Honor, as not being part of the proceedings.

"THE COURT: Overruled.

"Q Sir?

"THE COURT: Answer it. You decline to answer whether you will continue to answer.

"THE WITNESS: I will answer the same way.

"THE COURT: You will answer the same way?

All right.

"MR. JAFFE: At this time, your Honor, the government would ask the court under Title 28, Section 1826(a) to find that this witness is in contempt of court and the government's application is that the court order he be remanded to the custody of the Attorney General for the duration of this

1 ebh

2 proceeding until such time as he gives testimony before  
3 this court.

4 "THE COURT: Mr. Smilow, I want to explain something  
5 to you: I am about to hold you in civil contempt. That  
6 means that I am going to order that you be placed in the  
7 custody of the Attorney General for the duration of the  
8 trial unless in the interim, in the meanwhile you indicate  
9 your willingness to answer the questions you have declined  
10 to answer today. Do you understand?

11 "THE WITNESS: My copy is not altogether clear  
12 here that it appears--

13 "THE COURT: Let's get him a clear copy, please.

14 "MR. PUTZEL: I am doing the best I can. We are  
15 all working with Xeroxes.

16 "THE WITNESS: I understand.

17 "THE COURT: That is civil contempt and the purpose  
18 of civil contempt is to induce you to break your silence.  
19 There is another kind of contempt which is called criminal  
20 contempt which has as its purpose punishment for the crime  
21 of contempt. The two aren't exclusive. Do you understand  
22 what I have just told you?

23 "THE WITNESS: Yes.

24 "THE COURT: All right, Mr. Smilow. The court  
25 finds you in civil contempt and it is the order of the court

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

that you be committed to the custody of the Attorney General for the duration of the trial or until such time as you answer the questions which you have declined to answer today."

Your Honor, now reading from Government's Exhibit 3 which is the transcript of proceedings of June 27, 1973.

THE COURT: All right. Give me just a minute here. I am going backwards.

(Pause)

THE COURT: All right. Go ahead.

MR. GOLD: At page 249. Richard Huss, having been duly affirmed.

THE COURT: What is the date of this?

MR. GOLD: June 27, 1973.

THE COURT: This relates now to the questioning of Mr. Huss on June 27th? You are now going to read proceedings about Mr. Huss that took place some 20 days later.

MR. GOLD: That's correct.

THE COURT: And that is June 27th?

MR. GOLD: That's correct.

"Richard Huss having been duly affirmed, testified as follows. Direct examination by Mr. Jaffe.

"Q Mr. Huss, do you know an individual named Sheldon Davis?

"A The Court of Appeals has ruled that my prior

1 ebh  
2 refusal to answer questions in this proceeding on the grounds  
3 that to answer any questions would be a severe violation  
4 of the teachings of my religion and cannot be recognized  
5 by an American court as the basis for not testifying. With  
6 all duerespect to the decision of the Court of Appeals,  
7 and of the honorable tribunal, I find that the cardinal  
8 precepts of my religion must take precedence in my mind.  
9 Therefore I respectfully decline to answer any questions  
10 on the religious principles stated in my prior declinations  
11 before this honorable tribunal.

12 "THE COURT: I direct you to answer. I order you  
13 to answer.

14 "THE WITNESS: Same declination.

15 "MR. JAFFE: Excuse me just a minute, Judge.

16 "THE COURT: Before this goes any further, Mr. Huss,  
17 I want to tell you something: I explained the last time  
18 that your failure to answer questions when I have ordered  
19 you to answer constituted contempt of court. I told you  
20 that my having committed you for civil contempt does not  
21 preclude the bringing of charges of criminal contempt against  
22 you. I again want to advise you of that and I want to make  
23 other things abundantly clear to you, Mr. Huss: One. I am  
24 going to ask the United States Attorney to comply with the  
25 provisions of Rule 42(b) and proceed against you for criminal

1 ebh

2 contempt if you persist in your refusal to answer. I,  
3 for one, regard your refusal to answer as criminal contempt.  
4 I want further to advise you, Mr. Huss, that for criminal  
5 contempt there is no limit upon the amount of punishment  
6 which can be imposed upon you for that crime. Is that clear?

7 "THE WITNESS: Yes, your Honor."

8 Question by Mr. Jaffe.

9 "Q Mr. Huss, do you know an individual named Stuart  
10 Cohen?

11 "A Same declination.

12 "MR. JAFFE: Would your Honor direct the witness.

13 "THE COURT: I order you to answer.

14 "THE WITNESS: Same declination."

15 Question by Mr. Jaffe.

16 "Q Do you know an individual named Murray Elbogen?

17 "A Same declination.

18 "THE COURT: I order you to answer.

19 "A Same declination.

20 "Q Do you know an individual named Jeffrey Smilow?

21 "A Same declination.

22 "THE COURT: I order you to answer.

23 "A Same declination.

24 "Q Do you know an individual named Sheldon Seigel?

25 "A Same declination.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

"THE COURT: I order you to answer.

"A Same.

"Q Do you know an individual named Jerry Cellerkraut?

"MR. ZWEIBON: Your Honor, I think we have gone--

"THE COURT: I don't think so. Go ahead.

"Q Do you know an individual named Jerome Cellerkraut?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Directing your attention to the 25th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Cellerkraut?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Directing your attention to the 26th of January, 1972, did you see Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Cellerkraut?

"A Same declination.

"THE COURT: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court and I want you to have that in mind. I now order you to answer.

"THE WITNESS: Same declination.



1 ebh

2 "Q Directing your attention, Mr. Huss, to the morning  
3 of January 26, 1972, would you tell the court who you saw,  
4 that is, what persons you saw on that morning?

5 "A Same declination.

6 "THE COURT: I order you to answer.

7 "THE WITNESS: Same declination.

8 "MR. MILLER: Excuse me, your Honor. The witness  
9 has made it clear in my mind that he will not answer. I see  
10 no purpose in this continuing.

11 "THE COURT: Let me tell you what the purpose is:  
12 someone has committed a dastardly, vicious, unforgivable,  
13 unforgettable crime. Someone is frustrating the administra-  
14 tion of justice in a case that in my mind involves murder.  
15 People who deliberately do so will learn the power of the  
16 law even if there are those who have literally gotten away  
17 with murder. Proceed."

18 Question by Mr. Jaffe.

19 "Q Mr. Huss, on the morning of January 26, 1972,  
20 did you go in a motor vehicle with Sheldon Davis, with  
21 Jeffrey Smilow and Murray Elbogen and with Jerome Cellerkraut  
22 and drive in an automobile from Brooklyn to Manhattan?

23 "A Same declination.

24 "THE COURT: I order you to answer.

25 "THE WITNESS: Same declination.

1 ebh

2 "Q Had you, prior to the morning of January 26, 1972,  
3 agreed with Sheldon Davis and Stuart Cohen that you and  
4 Jerome Zellerkraut would go to the offices of Sol Hurok?

5 "A Same declination.

6 "MR SLOTNICK: I object to the form of the  
7 question.

8 "THE COURT: Overruled. Same order. I order you  
9 to answer.

10 "THE WITNESS: Same declination.

11 "Q Mr. Huss, did you, on the morning of January 26,  
12 deliver any attache case along with Jerome Zellerkraut to  
13 the offices of Sol Hurok?

14 "A Same declination.

15 "THE COURT: I order you to answer.

16 "THE WITNESS: Same declination.

17 "THE COURT: I again advise you that your continued  
18 refusal to answer these questions over my direction con-  
19 stitutes criminal contempt of court. Go ahead.

20 "Q Mr. Huss, prior to the morning of January 26, 1972,  
21 or on the morning of January 26, 1972, did you have any  
22 discussions with Sheldon Davis, Stuart Cohen, Sheldon Seigal,  
23 Jerome Zellerkraut, Murray Elbogen, or Jeffrey Smiley about  
24 carrying an attache case to the offices of Hurok Concerts  
25 Incorporated?

1 ebh

2 "MR. SLOTNICK: I object to the form of the  
3 question.

4 "THE COURT: Overruled. Answer please.

5 "THE WITNESS: Same declination.

6 "THE COURT: I direct you to answer.

7 "THE WITNESS: Same declination.

8 "Q Mr. Huss, were you ever part of any plan to  
9 deliver any incendiary devices to either Hurok Concerts  
10 Incorporated or Columbia Artists Management on the morning  
11 of January 26, 1972?

12 "MR. SLOTNICK: I object to the form of the  
13 question.

14 "THE COURT: Overruled.

15 "THE WITNESS: Same declination.

16 "THE COURT: I order you to answer.

17 "THE WITNESS: Same declination.

18 "MR. JAFFE: Your Honor, may I have a moment?

19 "THE COURT: Yes. I want the record to indicate  
20 at this point that immunity has been conferred upon this  
21 individual previously. Are you aware of that, Mr. Huss?

22 "THE WITNESS: Yes.

23 "THE COURT: And you have been aware of that  
24 all morning, have you not?

25 "THE WITNESS: Yes, your Honor.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

"Q Mr. Huss, on the morning of January 26, 1972, did you leave an incendiary device contained in a black attache case in the offices of Sol Hurok Concerts Incorporated?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"Q Mr. Huss, on the morning of January 26, 1972, at around 9:30, did you meet in Manhattan with Jerome Zellerkraut, Jeffrey Smilow and Murray Elbogen?

"MR. SLOTNICK: I object to the form of the question. Is not binding on my client.

"THE COURT: Overruled.

"MR. ZWEIBON: Same objection.

"THE COURT: Overruled.

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"MR. JAFFE: At this time the government would ask the court pursuant to Rule 42(b) to orally notify this witness that he is to be held in criminal contempt pursuant to Rule 42(b) in Sections 401 and 402 of Title 18, United States Code. We would state to the court that we are at this time ready to proceed forthwith with a trial for

1 ebh

2 criminal contempt of the witness Richard Huss.

3 "THE COURT: I want to tell you, Mr. Huss, as  
4 I have throughout your examination this morning, that your  
5 failure to answer the questions put to you constitutes  
6 in my judgment criminal contempt. However, so far as the  
7 United States Attorney is concerned, because of the serious-  
8 ness of this criminal contempt, I think that the United  
9 States Attorney should proceed on papers as indicated in  
10 Rule 42(b), namely, that part "or on application of the  
11 United States Attorney by an order to show cause or an order  
12 of arrest."

13 You have made the application and since you make  
14 the application, I ask you to comply with Rule 42(b) and  
15 proceed by order to show cause or an order of arrest so  
16 that the order to show cause, to be perfectly frank with you,  
17 will specify in writing for this man what he is facing.  
18 Obviously this proceeding will be a jury proceeding.

19 "MR. JAFFE: That's correct.

20 "THE COURT: Because it is inconceivable to me  
21 that anybody would be thinking of proceeding in a manner  
22 that would limit punishment if this man is guilty to six  
23 months, and therefore I want every letter observed. I want  
24 him proceeded against in writing, I want the case to proceed  
25 to a jury trial, and I want the judge, whoever he is, to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that but the law will make them pay.

"MR. JAFFE: Your Honor, with regard to Rule 42(b), the government would ask that, and we will comply with your Honor's direction to proceed on papers but the government would ask that since under Rule 42(b) notice can be given orally by the judge in open court in the presence of the defendant, and he will be a defendant, being cited for criminal contempt. I have so notified him it seems to me several times. If he has misunderstood me, I so notify him now. You will be a defendant in a criminal contempt proceeding, that is clear, isn't it, Mr. Huss?

"THE WITNESS: Yes, it is."

Your Honor, now reading from Government's Exhibit 4A, just the testimony of Jeffrey Smilow, also on June 27, 1973."Jeffrey Smilow, called as a witness in behalf of the government, was duly affirmed and testified as follows:"  
Line 4.

"THE COURT: Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

"THE WITNESS: No. I decline to do so.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

cbh

"THE COURT: I am not even going to ask him anything today other than the fact that he would persist in his refusals to answer. Beyond that I think the record is sufficient to proceed against him as I warned him the last time for criminal contempt and the United States Attorney advises me that he is going to do it based on the record the last time at which you made no such request. Then, if you want to take it up with the trial judge, whoever he may be, in his criminal contempt case, that may be the place to do it, but for now I believe, and I advise you, sir, that your failure to answer questions which you are now looking at, at the last session which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contempt is without limit, is that clear?

"THE WITNESS: Yes.

"MR. LEIGHTON: Is your Honor going to allow the United States Government to ask of Mr. Smilow questions concerning this record?

"THE COURT: No. The record is clear.

"MR. PUTZEL: I think the record is perfectly clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and accordingly, pursuant to Rule 42(b) of the Federal Rules of

1 ebh

2 Criminal Procedure, we will move this court through an  
3 order to show cause on papers to have Mr. Smilow cited for  
4 criminal contempt. I would ask the court to inquire of Mr.  
5 Smilow whether he was in court just previous to this during  
6 the time when Mr. Huss was advised by the court of the con-  
7 sequences of his refusal to testify.

8 "THE COURT: Were you here when I dealt with Mr.  
9 Huss a few moments ago? Were you in the courtroom?

10 "THE WITNESS: Yes.

11 "THE COURT: You heard the entire --

12 "THE WITNESS: Yes.

13 "THE COURT: Such as all the questions and  
14 everything I said to Mr. Huss?

15 "THE WITNESS: Yes.

16 "THE COURT: All right."

17 Thank you, Mr. Gross. I have no further questions.

18 THE COURT: No cross, Mr. Chevigny?

19 MR. CHEVIGNEY: No, your Honor.

20 THE COURT: You may be excused.

21 (Witness excused.)

22 MR. GOLD: Your Honor, at this time the government  
23 rests.

24 THE COURT: We will take a short recess at this  
25 point and I will see counsel in the robing room.

1 ebh

2 (The jury left the courtroom.)

3 (In the robing room.)

4 THE COURT: I just wanted to confer out of the  
5 presence of the jury motions or applications you had and  
6 see what you intend to do as far as putting in a case.

7 MR. CHEVIGNY: I would make a motion for  
8 acquittal here of course on the grounds that the government  
9 hasn't made a sufficient case against the defendants with  
10 relation to intent but I recognize--

11 THE COURT: You are making motions for the record  
12 on behalf of both defendants?

13 MR. CHEVIGNY: Yes.

14 THE COURT: Those motions are denied. What do  
15 you plan to do as far as your case?

16 MR. CHEVIGNY: I am going to put on Mr. Huss.  
17 I am going to ask him to testify as to what happened in  
18 the summer of 1972 with relation to certain members of the  
19 Jewish Defense League coming to see him. outside of the  
20 State of New York and then I am going to ask him to testify  
21 with relation to his religious conviction and I recognize  
22 or make an offer of proof with relation to that and I  
23 recognize that your Honor will exclude it.

24 THE COURT: Well, I am clear that I would refuse  
25 to let him testify on the religious objections, that the

1 cbh

2 question of religion is plainly irrelevant. Now let me  
3 hear about -- I don't mean -- I am not trying to get you  
4 to disclose your case in advance and normally I wouldn't.

5 MR. CHEVIGNY: I don't have any objection to it  
6 in this case actually.

7 THE COURT: But I think we have a situation here,  
8 which requires it if you don't mind. What would his testimony  
9 be about the transactions in the summer?

10 MR. CHEVIGNY: Essentially certain persons came  
11 to see him and said that they were looking for an informer,  
12 or they suspected that there was an informer in the group.  
13 He was one of those who was suspected, and that he should  
14 watch out that there might be persons who would be looking  
15 for him. And then I will ask him what his reaction to it was.

16 THE COURT: Is he ready to name those people?

17 MR. CHEVIGNY: Yes, he is ready to name them.

18 THE COURT: Why didn't he bring that up to Judge  
19 Bauman?

20 MR. CHEVIGNY: I didn't get it out of him until  
21 Friday. He also says -- I mean, he doesn't -- I mean, he says  
22 it put him in fear but it is not the only thing that he  
23 didn't testify. The religious ground is also a true ground  
24 with him. I mean, he is -- I am afraid he is a kid. That's  
25 the trouble. He is a little confused with relation to this.

1 ebh

2 THE COURT: Let's cover the matter of the alleged  
3 intimidation. What is the government's position?

4 MR. GOLD: Your Honor, the government's position  
5 is this: First, we think that's not a timely claim. If  
6 in fact such a claim could have been made the time to have  
7 made it was clearly before Judge Bauman. The claim was not  
8 made.

9 Secondly, even if such a claim could now be made,  
10 I think it is legally irrelevant unless it could come any where  
11 near amounting to a defense of duress which, even under the  
12 authorities that I have researched is not constituted a  
13 defense of criminal contempt. If he is prepared to testify  
14 under oath out of the hearing of the jury as your Honor  
15 has indicated naming names, places, and asserting that his  
16 life was placed in danger.

17 MR. CHEVIGNY: He is not going to assert that.

18 G. . GOLD: That is evidence of a crime.

19 MR. CHEVIGNY: You are not going to be able to  
20 get a conviction on his testimony because there is not going  
21 to be enough there.

22 THE COURT: I think what we ought to consider is  
23 this, whether this is something that he should be permitted  
24 to testify before this jury subject to your cross-examination.  
25 You would have the right to cross-examine him about his

1       cbh

2       failure to bring it up before Judge Bauman, or anything  
3       else you wanted, anything that was proper cross-examination.

4               Now, in my mind it is a question of whether the  
5       material is irrelevant as a matter of law so that the testi-  
6       mony wouldn't be permitted, or whether he should be per-  
7       mitted to get on the stand and tell his story, and then if  
8       you were able to cross-examine him, and then we will figure  
9       out an appropriate instruction, but I am concerned about  
10      saying that he has waived that ground by not raising it before  
11      Judge Bauman. After all, this is a criminal contempt pro-  
12      ceeding. It may be that it is no defense to this proceeding,  
13      but to simply preclude him from even testifying would concern  
14      me. It doesn't stand on the same basis as the religious  
15      objection. The religious objection was raised. It was ruled  
16      upon as a matter of law in prior proceedings, and I feel  
17      clear that it is a matter of law. Judge Kaufman ruled on  
18      the religious thing in the appeal on the civil contempt,  
19      did he not?

20               MR. GOLD: Yes.

21               MR. CHEVIGNY: It's been ruled on a couple of times.

22               THE COURT: But this is a new point. Now, to say  
23      that it is waived to me disregards the fact that this is to  
24      some extent a new independent proceeding, so I am afraid I  
25      think we ought to permit him to testify about the facts and



1       ekh

2       I think it is better to have it before the jury rather  
3       than before the court, and I cross-examine him and then I  
4       will instruct the jury, and if it turns out it is no defense  
5       I will so instruct the jury, but I don't know yet.

6               MR. GOLD: Will you hear me briefly, your Honor?

7               THE COURT: Yes.

8               MR. GOLD: I share your Honor's concern about  
9       the question of waiver. On the question of relevance, how-  
10      ever, I am much more clear in my mind. If we were to have  
11      an offer of proof under oath outside the hearing of the  
12      jury, I think if that is presented it would make it a good  
13      deal clearer whether or not the claim as established would  
14      constitute a recognizable defense. Indeed, if your Honor  
15      were to conclude that it did not, I think having those  
16      facts before the jury and then charging them nonetheless  
17      it is not a defense so terribly prejudicial to the government.  
18      I think if that claim is insufficient to amount to a defense  
19      in your Honor's mind, I think it should be kept away from  
20      the jury entirely because it technically and legally is  
21      irrelevant.

22              THE COURT: Would you be agreeable, Mr. Chevigny, to  
23      have Mr. Huss initially outline his testimony out of the  
24      presence of the jury?

25              MR. CHEVIGNY: Yes.

1 ebh

2 THE COURT: I think we will do that. Let's do  
3 that. Let's take a short break. You can all have a break,  
4 and then we will go back in the courtroom and tell the jury  
5 to hold on and we can I think clear this up.

6 MR. CHEVIGNY: Let me make sure I am going to  
7 be able to get it out of him now.

8 THE COURT: All right. You take a recess and  
9 then report back to me. In the meantime we will tell the  
10 jury that we have some proceedings to take care of, and we  
11 will get a report from you after about six or seven minutes.  
12 Thank you very much.

13 (Recess.)

14 THE COURT: Do you want to put Mr. Huss on?

15 MR. CHEVIGNY: Yes.

16 THE COURT: The jury is alerted to stand by. I  
17 think we will have it in court.

18 MR. GOLD: Your Honor, may I inquire, is it your  
19 intention to have me cross-examine now? What is the pro-  
20 cedure going to be?

21 THE COURT: I just want to have enough to make  
22 a ruling of law as to whether the testimony will be admitted.  
23 I really can't proceed otherwise.

24 Let the record show that we are having this  
25 proceeding out of the presence of the jury by agreement of

1 ebh Huss-direct

2 both sides and the purpose is to permit Mr. Huss to indicate  
3 the subjects on which he wishes to testify so that the  
4 court can rule whether those items of testimony can be  
5 admitted or will be excluded. All right, do you want to call  
6 Mr. Huss?

7 MR. CHEVIGNY: Yes. The defense will call Mr.  
8 Huss for an offer of proof with relation to his state of  
9 mind.

10  
11 R I C H A R D H U S S, called as a witness, having been  
12 affirmed, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. CHEVIGNY:

15 Q Mr. Huss, do you recall the summer of 1972?

16 A Yes, I do.

17 Q Did there come a time when you were out of the  
18 City of New York?

19 A Yes.

20 Q Where were you?

21 A I was in Framingham, Massachusetts.

22 Q What were you doing in Framingham?

23 A I was working as a stage hand for a dinner theatre.

24 Q How old were you at that time?

25 A I was 17.

1 ebh

Huss-direct

2 Q Did there come a time in Framingham that summer  
3 when you saw persons that you identified with the Jewish  
4 Defense League?

5 A Yes.

6 Q Can you tell the court who they were?

7 A Neal Rothenberg, Gene Kleinhandler and Larry  
8 Amsel.

9 THE COURT: Who did you say?

10 THE WITNESS: Gene Kleinhandler.

11 Q Start over and spell them as you go.

12 A I don't think I can spell them.

13 THE COURT: I guess it would be K-l-e-i-n-h-a-n-d-  
14 l-e-r.

15 What is the second name?

16 THE WITNESS: N al Rothenberg and Larry Amsel.

17 Q Do you have any idea how to spell Amsel?

18 A A-m-s-e-l.

19 Q Do you know whether Mr. Rothenberg had any office  
20 in the Jewish Defense League?

21 A Yes.

22 Q What was that?

23 A He was National Coordinator for Youth.

24 Q Did any of those persons say anything to you?

25 A Yes.

1 ebh

Huss-direct

2 Q Who?

3 A Neal Rothenberg and Larry Amsel.

4 Q What did Neal Rothenberg say to you? First of  
5 all, when did this take place, if you recall?

6 A I suppose about halfway during the summer.

7 MR. GOLD: Your Honor, may we find out who else  
8 was present at the time of this alleged conversation?

9 THE COURT: Who all was present.

10 THE WITNESS: Just myself and those three people.

11 Q You said about halfway through the summer.

12 Can you come any closer than that?

13 A (No response)

14 Q Can you give us the month, for example?

15 A I imagine it was July.

16 Q What did Mr. Rothenberg say? First, just where  
17 did this occur?

18 A It occurred outside Caesar's Monticello diner  
19 and motel in Framingham, more or less in the parking lot.

20 Q Out of doors?

21 A Yes.

22 Q What did Mr. Rothenberg say to you?

23 A He said that there had been some arrests, that  
24 I had previously heard about members of the Jewish Defense  
25 League, that there was sort of a witch hunt inside the JDL

ebh Huss-direct

because the police had let it be known that there was an informer. I believe they hinted that I was the informer--

THE COURT: Who hinted this?

THE WITNESS: The police.

THE COURT: They said, Rothenberg said that the police had hinted you were the informer.

THE WITNESS: That's right.

Q And what happened then? Did he say anything else to you?

A Yes. He said that certain people inside and outside the JDL might possibly be looking for me in order to find me and I don't know, I guess to do me bodily harm.

THE COURT: It isn't a matter of what you guess. What did he say?

THE WITNESS: He said that there were people looking for me.

THE COURT: That's the end of what he said.

Q Were those his exact words, that they would be looking for you?

A I think so.

Q Did he specify who they were?

A No, he didn't.

Q Did Mr. Rothenberg say anything else to you?

A He said I should be careful, if I heard anything



1 ebh

Huss-direct

63

2 or saw anything of these people that I should call him if  
3 I could. He said not to come back to New York until I  
4 had checked with him.

5 Q Okay. he say anything else to you that you  
6 can recall now?

7 A No. He just said to be careful.

8 Q What did Larry Amsel say to you, if anything?

9 A Larry Amsel gave me a warning as to the --

10 Q Don't tell us that he gave you a warning. Tell  
11 us the words he said to you, in words or substance as nearly  
12 as you can recall.

13 A I shouldn't get caught in a room with these people,  
14 that I should run. He said he wouldn't want to get caught  
15 with these people.

16 Q Did he specify who they were?

17 A No, he didn't.

18 Q Did he say anything else?

19 A I don't think so.

20 Q What was your state of mind following that en-  
21 counter?

22 A I was a little bit confused, and a little bit  
23 afraid.

24 Q Did you subsequently ever receive anything that  
25 you would define as a personal threat to you from any person

ebh Huss-direct

1 ebh  
2 that you identified with the Jewish Defense League subse-  
3 quent to that time?

4 A Not directly as you put it but I called my  
5 house after that to find out if anyone was looking for me,  
6 and my mother told me that certain people calling themselves  
7 friends of mine called up to find out where I was.

8 Q Did she say who they were?

9 A No. Just friends.

10 Q Did you receive anything else that you considered  
11 a threat?

12 A No.

13 Q Ever?

14 A Yes.

15 Q Up to the present time.

16 A Yes.

17 Q Would you like to tell us about that?

18 A After I got back from this job.

19 MR. GOLD: Your Honor, may we have the time and  
20 place please?

21 Q Yes. Can you tell us approximately when and where?

22 A (No response)

23 Q Or exactly, if you know.

24 A I imagine it was the end of August. No, that's  
25 not correct. I think it was the beginning of August, and

ebh Huss-direct

it was in the Jewish Defense League's office in Manhattan.

MR. GOLD: I'm sorry. I don't know what year we are talking about, your Honor.

THE COURT: 1972.

THE WITNESS: 1972.

Q The Jewish Defense League's office where?

A In Manhattan.

Q What happened? First of all, whom did you see?

A I went to see Neal Rothenberg about what he had previously told me, and while I was up there a certain

person came up to me --

Q Who was that person?

A That was Bobby Fein.

Q Bobby Fein?

A That's right.

Q And what did he say?

A He more or less said that he hoped I wasn't the informer. He told me that he knew I had family and that he just hoped for my sake that I was not the informer.

Q Did he say anything else?

A Not that I remember.

THE COURT: Did you go see Rothenberg?

THE WITNESS: Yes.

THE COURT: What was that conversation?

1 ebh

Huss-direct

2 A He told me that everything was all right, that  
3 they knew I was not the informer. That they thought people  
4 were no longer looking for me.

5 Q Did anything else happen of a nature that you  
6 would describe as a threat up to the present time?

7 A I don't think so.

8 MR. CHEVIGNY: That is all.

9 THE COURT: Did you ever tell this to Mr. Smilow?

10 THE WITNESS: I don't remember.

11 THE COURT: You don't remember doing that?

12 THE WITNESS: No.

13 THE COURT: I don't know where this gets us.  
14 There is nothing about what he was thinking about, or  
15 motivation, or what effect it had on him at the time that  
16 he was called before Judge Bauman in the summer of 1973, so  
17 if the proof stopped here, I just don't know what it will  
18 do. Do you want to ask him anything more?

19 MR. CHEVIGNY: All right, I will continue then.

20 BY MR. CHEVIGNY:

21 Q You testified before Judge Bauman in June of last  
22 year, do you recall that testimony?

23 A Yes, I do.

24 Q At the time that you testified before Judge  
25 Bauman, did you recall the events of the summer of 1972?

1 ebh

Huss-direct

2 A Not specifically. I guess they were in the  
3 back of my mind but I wasn't thinking about them speci-  
4 fically at the time of the trial.

5 Q Did that influence your decision with relation  
6 to testifying in June of last year in part or in whole?

7 A No, I don't think so.

8 MR. GOLD: Your Honor, I would think that would  
9 terminate the inquiry.

10 THE COURT: Well, I think it is -- what do you  
11 say, Mr. Chevigny?

12 MR. CHEVIGNY: I would like to put him on in  
13 front of the jury and let the jury decide. I think it is  
14 a question of fact. He is here. Some of his friends  
15 are here. I think that these things don't stop. I think  
16 he should be permitted to testify to it and that the jury  
17 should be permitted to decide.

18 THE COURT: Well, he has testified that this was  
19 in the form of an offer of proof as to what he would testify.  
20 Now, I got to assume that this is the way he would testify,  
21 no more, no less.

22 MR. CHEVIGNY: I'm sure it is.

23 THE COURT: And he has said that -- let's read  
24 the last answer.

25 (Record read.)

1 ebh

Huss-direct

2 MR. CHEVIGNY: Could I try a little more your  
3 Honor?

4 THE COURT: You can do whatever you wish here.

5 Q Do you understand my question?

6 A Yes, I do.

7 Q Let me take it in two pieces. Did it have any  
8 influence on you in the slightest in 1973?

9 A Well, yes, from what I understood from members  
10 of the JDL, I understood -- well, I guess I was threatened.

11 THE COURT: Now wait a minute. What Mr.  
12 Chevigny is asking -- I thought you had covered it, but  
13 he is asking -- well, the focus of this case, as you  
14 perfectly well know, is on the proceedings before Judge  
15 Bauman on June 8th and June 27, 1973.

16 Now, at that time you were before Judge Bauman.  
17 Did the events that you have described have any influence  
18 on your decision not to testify before Judge Bauman?

19 A No, they didn't.

20 THE COURT: I think we will terminate this.  
21 Thank you, Mr. Huss. And we will bring back the jury now  
22 and I will rule that the offered testimony will not be  
23 permitted.

24 (Witness excused)

25 THE COURT: In view of that, Mr. Chevigny, will



1 ebh

2 you rest? I think you preserved your record. You made  
3 your motions. The motions have been denied and you have  
4 advised me that you would offer to have Mr. Huss testify  
5 on the religious grounds for his objection. I have ruled  
6 that that would be inadmissible. You make this offer of  
7 proof and I have ruled that that would be inadmissible.

8 MR. CHEVIGNY: Thank you, your Honor. I respect-  
9 fully except.

10 THE COURT: All right. You except. Will you rest  
11 then when the jury comes back.

12 MR. CHEVIGNY: No, I don't have anything. I  
13 will rest.

14 THE COURT: All right. Now, let's just talk about  
15 our scheduling. I just want to see what the lawyers would  
16 like to do about scheduling.

17 MR. CHEVIGNY: I prefer to sum up after lunch.

18 THE COURT: That is perfectly agreeable with me  
19 to have summations and charge after lunch. You can take  
20 an early lunch so why don't we adjourn now until a quarter  
21 of 1.

22 MR. CHEVIGNY: All right, your Honor.

23 THE COURT: Let's bring the jury in. I meant to  
24 say a quarter of 2. An hour and a half lunch.

25 (The jury entered the courtroom.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

THE COURT: Ladies and gentlemen, we had a couple of legal matters which detained us and that is the reason we took a fairly long break. Now I think -- well, as I understand it, the defendants rest, is that right, Mr. Chevigny?

MR. CHEVIGNY: Yes, the defense rests, your Honor.

THE COURT: What remains to be done is to have the lawyers sum up and then have me deliver my charge on the law, and then you will go to your deliberations. I would like to take our lunch break earlier. We will take an hour and a half for lunch and then resume promptly at quarter to 2 and be ready at that point to go right into summations. So again, please don't discuss the case over lunch. And I would like to see the lawyers at 1:30 to go over that one point about the charge we talked about this morning, so the lawyers and I will meet at 1:30 and the jury will be back at a quarter to 2, please.

(Recess to 1:30 P.M.)

----

1 ebh

2 AFTERNOON SESSION

3 1:45 P.M.

4 THE COURT: I have got the supplemental request  
5 number 5 from the government which looks okay to me as  
6 far as it goes. Do you have any suggestions?

7 MR. CHEVIGNY: I'm sorry, I didn't have access  
8 to my office but that is what I have.

9 THE COURT: That's fine.

10 I think this is substantially the same as what you  
11 put in your original charge.

12 MR. CHEVIGNY: Yes. I tailored it to fit the  
13 crime better than I did before.

14 THE COURT: But it still contains the idea of  
15 specific intent and bad purpose to disobey or disregard  
16 the law and I will not use that charge. You can get the  
17 clerk to mark this for identification so your record is  
18 preserved.

19 MR. CHEVIGNY: All right.

20 THE COURT: Maybe both of these requests, you  
21 get the clerk to mark them for identification.

22 Now let me just go through, I think I should  
23 go through the charges now quickly. And rule on them.

24 Government's request number 1 granted.

25 Request number 2 is not granted. I don't see any

1 ebh

2 reason to quote Rule 42(b), and I don't see any particular  
3 utility in giving that summary.

4 Request number 3 is not granted. I don't think  
5 there is any reason to read the community statute. I will  
6 explain immunity to the extent that I have to.

7 Request number 4, I don't see any reason to  
8 talk about them having to find that the court had juris-  
9 diction. There is no real issue. I will just outline three  
10 elements, the need to be proved. First, that the court  
11 gave the particular defendant under consideration certain  
12 orders directing the defendant to answer questions and  
13 testify.

14 Second, that the defendant disobeyed those orders.

15 Third, that the defendant acted wilfully and  
16 knowingly in so disobeying. Those will be the three elements  
17 outlined.

18 I will state as a matter of law that Judge  
19 Bauman's orders were lawful and proper. I will use part of  
20 request number 4 and other parts I will not use request  
21 number 5 I will use the government's supplemental request  
22 number 5.

23 Request number 6 I will use part of it and I will  
24 expand to explain that the other objections were made invalid  
25 as a matter of law.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

MR. GOLD: Your Honor, with regard to that, I will find it terribly helpful in lining up my summation. I take it you are going to leave out the bottom portion of that charge. If you remember, I don't want to get into it in my summation.

THE COURT: I won't quote. You mean the quotation part from Smilow?

MR. GOLD: Yes.

THE COURT: I wouldn't go into that in my charge. Now, request number 7 is granted.

Request number 8 is granted in substance. Under the miscellaneous requests I will discuss presumption of innocence. I see no reason to marshal the evidence. I will discuss presumption of innocence. The jury's province is to determine the facts with the limited issues presented here. There is no reason to really go into the jury's recollection controlling. All the evidence is in writing. Statements of counsel. I will give an instruction about that. I will give an instruction about burden of proof and reasonable doubt. I will give an instruction about a unanimous verdict. And about the defense testimony, you didn't present anything about -- well, the defendants didn't testify. Do you want an instruction about their right not to testify.

MR. CHEVIGNY: That would be good, yes. I should

1 ebh  
2 have thought of that.

3 THE COURT: Okay.

4 Now let me go to Mr. Chevigny's -- I will certainly--  
5 there are basically three -- well, the defense proposed  
6 charge about the elements I think is basically correct.  
7 A listing of the elements, although I will instruct the  
8 jury that the orders of Judge Bauman were lawful, then the  
9 joint trial of the defendants, I will give that instruction,  
10 and as we -- I will not give the instruction requested about  
11 intent or wilful, the definition of wilful. I will give  
12 an instruction about presumption of innocence which is  
13 substantially the same as --

14 MR. GOLD: Your Honor, may I inquire, do you intend  
15 to use the term moral certainty in your charge on reasonable  
16 doubt?

17 THE COURT: No, I wouldn't use that. I will use  
18 the standard charge on this in this district. We don't use  
19 moral certainty.

20 Now, I have got to make a note to myself to put  
21 this in.

22 (In the courtroom. Jury present.)

23 THE COURT: Mr. Chevigny.

24 MR. CHEVIGNY: Thank you, your Honor.

25 Ladies and gentlemen of the jury, this has been

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

a short case, as you know, I am sure we all feel it's been rather extraordinary as criminal cases go. The government has read into the record the refusals of these defendants to answer the questions put to them by the United States Attorney and by the Judge in the earlier proceeding that was mentioned to you, and I suppose now the question in everyone's mind is what is to be said about this.

I have this to say to you: It is a simple case. I don't want to take a lot of your time but the case is extraordinary in that what was read to you tells you a great deal more about these defendants and what happened with relation to their testimony than you would ordinarily learn in a criminal case.

You learned from the government's proof that the defendants did refuse to answer, that they refused to answer because they felt that it was a violation of their religion, because they felt it was a violation of their religion to take a reward for betraying other persons in their religion.

You learned that they were subjected to civil contempt. That they took their issues up on appeal. That they were put in jail for that civil contempt. That they suffered a penalty for that.

You learned that they are both very young men.



1       cbh

2       That Jeffrey Smilow answered that he was 18 years old at  
3       the time he was asked those questions.

4               You learned that from this very record, from the  
5       words of Judge Bauman, that there is a possible limitless  
6       penalty for the crime that is charged here.

7               I am not going to pretend to you in some way  
8       that they answered the questions. I am not going to play  
9       any tricks with you. The charge will charge you with relation  
10      to the law that the defendants, the Judge intends to charge  
11      you that the orders of Judge Bauman were lawful. It seems to  
12      me the question for you to decide is whether within the  
13      meaning of the law there was an intent on the part of these  
14      defendants to show contempt for the court, whether their  
15      intention is to defy the law within the meaning of the law.

16              The Judge will charge you that this is a crime  
17      which requires wilfulness, which requires intent. Wilfulness  
18      to show contempt for this court, for the judge or judges  
19      of the Southern District of New York.

20              In light of the fact that the defendants asserted  
21      that their religion would not permit them to testify against  
22      another Jew you have to ask yourselves whether that shows  
23      a wilfulness to show contempt for the court or whether it  
24      doesn't show a respect for a higher law.

25              Finally, I ask you to do justice generally in this

1 ebh

2 case. Consider the fact that the defendants have been found  
3 guilty already of civil contempt, that they have already  
4 suffered for this crime. Consider that when you make your  
5 decision.

6 I ask you to take their age into account but  
7 to consider in particular, in light of the charges that the  
8 Judge is going to give you, whether you can really say beyond  
9 a reasonable doubt that the defendants wilfully, within the  
10 meaning of the law, committed a contempt of this court.

11 THE COURT: Mr. Gold?

12 MR. GOLD: Ladies and gentlemen, the evidence of  
13 the guilt of each of these defendants is overwhelming. They  
14 are absolutely inescapable.

15 In a few minutes his Honor is going to give you  
16 detailed instructions on the law and accordingly the only  
17 remaining issue in this case is whether or not you are going  
18 to apply the law as he gives it to you to the facts already  
19 before you.

20 I submit that if you do that, you really have  
21 no choice but to return a verdict of guilt against each of  
22 these defendants.

23 As his Honor will shortly instruct you, in order  
24 to prove its case, the government has to prove three things:

25 First, we must show that the court, Judge Bauman,

1 ebh

2 gave each of these defendants an order or a command. The  
3 evidence shows that Judge Bauman did precisely that in the  
4 course of the fire bombing trial. The evidence shows that  
5 he did so not once but repeatedly, time and time again  
6 in the clearest conceivable way.

7 I expect that his Honor will shortly charge you  
8 that Judge Bauman's orders were lawful and proper in every  
9 respect.

10 Second, we must also show that the defendants  
11 disobeyed those orders. What is the proof of that? You  
12 have heard the evidence this morning that each of these  
13 defendants refused to answer when ordered to do so time and  
14 time and time again.

15 The evidence is that they refused to obey those  
16 orders with complete awareness of what they were doing  
17 with a complete understanding of the extent of those orders.

18 Finally, the government has to show that the  
19 defendants acted wilfully and knowingly in refusing to  
20 obey Judge Bauman's orders.

21 Is there really any question at all that the  
22 defendants understood what Judge Bauman's orders were? Is  
23 there really any question that understanding those orders,  
24 they nonetheless refused to obey?

25 Reading from Government's Exhibit 3 in evidence,

1       cbh

2       you will recall that on June 27, 1973, both defendants  
3       were recalled to testify as government witnesses.

4               In the course of that proceeding, Judge Bauman  
5       told Mr. Huss the following:

6               "Before this goes any further, Mr. Huss, I want  
7       to tell you something. I explained the last time that your  
8       failure to answer questions when I have ordered you to  
9       answer constituted contempt of court. I told you that my  
10      having committed you for civil contempt does not preclude  
11      the bringing of charges of criminal contempt against you.

12              I again want to advise you of that, and I want  
13      to make other things abundantly clear to you, Mr. Huss."

14              You will recall that at that point he explained  
15      how he was going to urge the United States Attorney to  
16      commence a criminal prosecution for criminal contempt of  
17      court.

18              What was Mr. Huss' response to that? Mr. Huss said  
19      "I understand, your Honor."

20              Thereafter Mr. Huss refused to answer seven more  
21      times. Each time Judge Bauman ordered him to do so. Then  
22      Judge Bauman said "I want to again advise you that your  
23      refusal to answer these questions over my order constitutes  
24      in my view criminal contempt of court. I want you to have  
25      this in mind. I now order you to answer. Mr. Huss' response

1 ebh

2 "Same declination." What about Mr. Smilow? He was also  
3 recalled to testify on June 27th. He told Judge Bauman  
4 that he would refuse to answer every question put to him  
5 as he had on June 8th the previous occasion when he testified.

6 Judge Bauman told Mr. Smilow, for now I believe  
7 and I advise you, sir, that your failure to answer questions  
8 which you are now looking at, at the last session at which  
9 you were called upon to testify constitutes criminal contempt  
10 of court and that the punishment for criminal contempt is  
11 without limit. Is that clear?

12 DEFENDANT SMILOW: "Yes."

13 The court then asked Mr. Smilow if he was present  
14 in the courtroom when the judge advised Mr. Huss about what  
15 was going to happen to him if he continued to refuse to  
16 testify.

17 Mr. Smilow responded "Yes. I was in the courtroom.

18 "Bauman: You heard the entire situation. All the  
19 questions and everything I said to Mr. Huss?

20 "Smilow: Yes."

21 The overwhelming evidence is that Judge Bauman  
22 warned both defendants of the consequences if they persisted  
23 in their refusal to disobey his order.

24 He told them over and over and over again that  
25 if they refused to testify, they would be prosecuted for

1 ebh

2 criminal contempt.

3 I submit that the evidence clearly shows that  
4 both defendants were in full awareness of Judge Bauman's  
5 admonitions. They understood everything he said. Nonetheless,  
6 they literally chose to be found in contempt. They  
7 literally subjected themselves to their prosecution.

8 As I have already said, the evidence in this  
9 case is absolutely overwhelming. It is just staggering.  
10 And I want to talk to you for a minute about something which  
11 might be of concern to you now and that is this: Why are  
12 we here? Ladies and gentlemen, the answer to that question  
13 is simple, straightforward, and I submit that it is something  
14 that we can all take great pride in, and it is this: under  
15 our system of justice, every person in this country, no matter  
16 what crime he may have committed, no matter what crime he  
17 may be charged with having committed, no matter how over-  
18 whelming the evidence of his guilt, that person is entitled  
19 to say to the government, "You prove it." I submit to you  
20 ladies and gentlemen that is precisely what we have done here  
21 today. The defendants have in effect challenged the government  
22 to prove their guilt beyond a reasonable doubt. It is a  
23 challenge which we accept without hesitation. It is a challenge  
24 I submit to you that we have met with overwhelming proof.  
25 I urge you please don't hold it against these defendants for

1 ebh

2 having put the government to its proof. That was their  
3 absolute right.

4 Now Mr. Chevigny didn't have too much to say about  
5 the evidence in this case. That is understandable. We  
6 all find it difficult to make value judgments about other  
7 human beings, but as his Honor told you at the beginning  
8 of the case, and as I expect he will tell you in a few  
9 minutes, sympathy has absolutely no place whatever in  
10 a court of law. If it did, if sympathy were given decisive  
11 weight in a criminal case, the sympathetic defendant would  
12 always go free no matter how terrible the crime he committed,  
13 no matter how overwhelming was the proof of his guilt. Your  
14 job is to weigh the evidence dispassionately and thoroughly  
15 to both sides. And I submit that if you do that in this  
16 case, in accordance with the instructions which Judge Friesa  
17 will give you in a few minutes, you will find that the evidence  
18 overwhelmingly establishes a violation of federal law. But  
19 I urge you to consider something else.

20 The laws of this country are not self-constituting.  
21 In a very real and immediate sense our laws, although enacted  
22 by Congress, are not enforced until a court of law and a  
23 jury see to it that they are enforced.

24 As the jurors in this case, that is your re-  
25 sponsibility. Indeed, it is your absolute sworn duty to do just



1 ebh

2 that. I trust that your collective judgment will be to  
3 uphold and enforce the law by returning verdicts of guilty  
4 against each of these defendants and by doing that you  
5 will reaffirm what hopefully each of us believes, namely,  
6 that no man, no matter who he is, can place himself above  
7 the law. Thank you.

8 (At the bench.)

9 THE COURT: I was a little taken aback by your  
10 comment about the civil contempt penalty. The government  
11 does not -- I don't think there is anything in the record  
12 to show any amount of jail. Were they in jail?

13 MR. GOLD: My understanding is that they were  
14 remanded. I don't know how many days in fact they spent in  
15 custody. I tried to cut that out but I didn't want to make  
16 an objection because I thought it would be prejudicial.

17 THE COURT: The thinking is, I know Judge Bauman  
18 ordered them remanded but then there were the appeals,  
19 and I don't know whether they were out on bail pending that  
20 appeal. I would like to know the facts.

21 MR. CHEVIGNY: I don't know how many days they did.  
22 Do you want me to find out?

23 THE COURT: Yes. I would appreciate that.

24 (Pause)

25 MR. CHEVIGNY: Huss was in 26 days and Smilow was

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh  
in 21 days.

THE COURT: All right. I am not going to --  
I will have to instruct the jury that they cannot consider  
that but anyway I won't go into any facts that are not  
in the record. All right. I will go ahead with my charge.

MR. CHEVIGNY: Your Honor, would this be a good  
time to mark these exhibits or should we do that after you  
charge?

THE COURT: Afterwards.  
(In open court.)  
(Two marshals sworn.)

1 UNITED STATES OF AMERICA

2 VS.

73 Cr. Ms. 25

73 Cr. Ms. 24

3 RICHARD HUSS and JEFFREY H. SMILOW,

4 Defendants.

6 July 16, 1974

7 (T. P. GRIESA, DJ)

8 CHARGE OF THE COURT

9 THE COURT: Let me first thank the lawyers  
10 for both sides for their courtesy and cooperation  
11 and their efficiency, and let me thank you ladies  
12 and gentlemen of the jury for your attention.

13 We had a long questioning session yesterday,  
14 but the proof has been short. In any event, whether  
15 a case is long or short, it is worthy of the most  
16 serious consideration in a criminal matter and I know  
17 that you have given it your most earnest consideration  
18 and you will continue to do so until your responsi-  
19 bilities are discharged.

20 A case, whether it is short or long, or whether  
21 it is a regular criminal case or a criminal contempt  
22 proceeding, whatever the nature, a criminal matter  
23 is inevitably important. It is important to the  
24 government, to the community, to have the criminal  
25 laws of this community enforced, and to have lawful

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

orders of a court of law carried out.

At the same time, this criminal case is important to these defendants because they are charged with a serious crime that inevitably makes the case important to them. All this is obvious but needs to be said so that you know emphatically that your responsibility here is one of great importance to be carried out properly.

Now we are at this stage in the trial, the final stage in the trial where you as the jury and I as the court carry out our final functions.

As I said at the outset, you as the jurors must not act in this courtroom on this case with any form of bias or prejudice or emotion either for the government or against the government, or for the defendants or against the defendants.

Any bias or personal feeling, inflamed feeling, or sympathy has no place in a court of law in this kind of a case.

As I said this morning, but will repeat, the case must be decided on the basis of the evidence and the rules of law. If you or I were to disregard the evidence and the rules of law and were to make

3

up our minds on the basis of emotion, then we need not have court proceedings.

Now, my final function as the judge or the court is to instruct as to the law. It is your duty and responsibility to accept my instructions on the law whether you may like them or agree with them, or otherwise. Your function as the jury is to take the law as I give it to you and apply it to the evidence, and then render your verdicts.

As you know, the evidence in this case consists solely of the transcripts of the proceedings before Judge Bauman in addition to the brief stipulation as to the authenticity of these transcripts.

You heard the transcripts read to you. They are documentary exhibits in the case and they will be available for you to peruse during your deliberations to the extent you feel you need to do so. But basically, those transcripts are the evidence, and that's what you need to apply the law to and render your verdicts.

Although these two defendants have been tried together for convenience, you must consider the case of each defendant separately and individually. That

1  
2  
3 is, you must consider separately whether the govern-  
4 ment's evidence is sufficient to convict the defend-  
5 ant Huss, and then you must consider whether the  
6 government's evidence is sufficient to convict the  
7 defendant Smilow. And then render your separate  
8 verdicts on each defendant.

9 Anything that the lawyers either for the govern-  
10 ment or for the defendants have said during the trial,  
11 during the opening statements, or during summations,  
12 anything they have said with regard to the evidence  
13 or with regard to their view of the evidence, is not to be  
14 substituted for the actual evidence. The statements  
15 of counsel are not in and of themselves evidence.

16 They make, in the case of the government, an  
17 opening statement, and in the case of both sides  
18 they have made summations to tell you their arguments  
19 about what the evidence has or has not proved and  
20 about the significance of that evidence. But the  
21 actual evidence is what I have told you it is, and  
22 neither the lawyers' statements nor, indeed, anything  
23 I say actually is a substitute for the real evidence.

24 The government has the burden of proving the  
25 charges against each defendant beyond a reasonable

5

doubt. A defendant in this case, as in any criminal case, is not required to prove his innocence. On the contrary, the defendants in this case, as in any criminal case, are presumed at the outset to be innocent of the accusations against them. The presumption of innocence is in the defendant's favor at the start of the trial. It is in the defendant's favor as I instruct you now, and the presumption of innocence remains in favor of each defendant during the course of your deliberations in the jury room.

That presumption of innocence is removed only if and when you are satisfied that the government has sustained its proof, its burden of proving the guilt of each defendant beyond a reasonable doubt.

What do we mean by "reasonable doubt"? These are words that are almost self-defining but a little explanation may help.

A reasonable doubt is a doubt founded in reason. The key word is "reason" arising from the evidence or the lack of evidence. It is a doubt which a reasonable thinking person has after carefully weighing all the evidence. It is a doubt which would appeal to common sense or experience.



1  
2  
3 But let me say some things which "a reasonable  
4 doubt" is not. A reasonable doubt is not caprice or  
5 whim. It is not just speculation, conjecture, sus-  
6 picion. A reasonable doubt is not an excuse to  
7 avoid the performance of an unpleasant duty.

8 Now, if, after a fair and impartial consideration  
9 of all the evidence you can say that you are not  
10 satisfied as to the guilt of a defendant, if you have  
11 such a doubt as would cause you as prudent persons  
12 to hesitate before acting in some matter of importance  
13 to yourselves in your own lives, then you can say  
14 that you have a reasonable doubt, and in that cir-  
15 cumstance it is your duty to acquit the particular  
16 defendant whom you are considering.

17 On the other hand, if, after this impartial  
18 and fair consideration of all the evidence, you can  
19 say that you do have an abiding conviction of the  
20 defendant's guilt, the particular defendant you are  
21 considering, such a conviction or persuasion as  
22 you would be willing to act upon in important matters  
23 in your own lives, then you can say you have no  
24 reasonable doubt, and under these circumstances it  
25 is your duty to convict the particular defendant you

are considering.

One final word on this subject is this: proof beyond a reasonable doubt doesn't mean proof to an absolute certainty beyond all possible doubt. If that were the rule, few persons, however guilty, would ever be convicted. It is almost impossible for a person to be absolutely convinced of any controverted fact unless it is in the realm of mathematics, perhaps. So the law of a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Now, let me read to you the brief statutory provision with which we are concerned. In this case each of the defendants, Richard Huss and Jeffrey Smilow, is charged with criminal contempt of court for their allegedly willful refusal to obey orders of Judge Bauman of this court to testify at a criminal trial.

The statute upon which this charge of criminal contempt is based is contained in Title 18 United States Code, Section 401, which provides in part as follows:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

"A court of the United States shall have power to punish at its discretion such contempt of its authority as disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

That is the statute which is being applied in this case. It is further the law that in this type of criminal contempt case the trial is to a jury.

Now let me outline to you the three elements which you must find the government has proved beyond a reasonable doubt as to each defendant before you can convict that defendant. In other words, in order to convict either the defendant Huss or the defendant Smilow, you must find as to each one that the government has proved beyond a reasonable doubt these three elements.

First, that the court, namely Judge Bauman, gave the particular defendant certain orders directing that defendant to answer questions and testify.

Second, that the defendant disobeyed those orders.

Third, that the defendant acted willfully, and knowingly in disobeying the court orders.

Concerning the first element relating to the

giving of orders by Judge Bauman, I instruct you that if you find from the evidence that Judge Bauman gave the orders, I instruct you as a matter of law that those orders were lawful and proper in every respect.

I instruct you that those orders, if you find that they were given, didn't violate any constitutional or other legal rights of either of these defendants.

I have told you, in connection with describing the elements which you must find proved in order to convict, that you must find that the particular defendant you are considering disobeyed Judge Bauman's orders and did so willfully and knowingly.

Now, what is meant by "willfully and knowingly"? Let's bring it down to the specifics of this case rather than talking in the abstract. I instruct you that if you find beyond a reasonable doubt that the defendant that you are considering understood Judge Bauman's orders and consciously refused to obey those orders, that defendant's conduct was willful and knowing.

Now, you will recall that both the defendant

1 10

2 Huss and the defendant Smilow, during the first part of  
3 their questioning by Judge Bauman, according to the  
4 evidence in the transcript, asserted their Constitutional  
5 privilege against testifying in ways that might incriminate  
6 themselves.

7 You will also recall that Judge Bauman granted both  
8 Huss and Smilow immunity from prosecution, and both Huss  
9 and Smilow stated that they understood that they had re-  
10 ceived immunity.

11 After being granted immunity, neither Huss nor Smilow  
12 raised the self-incrimination problem again.

13 In any event, I instruct you that the privilege  
14 against self-incrimination was not a valid reason for  
15 refusing to testify before Judge Bauman after the judge  
16 had granted them immunity.

17 The privilege against self-incrimination is not a  
18 defense in this criminal contempt case as to either of the  
19 defendants.

20 The invoking of the privilege in the earlier pro-  
21 ceeding is no defense here. I don't understand it is even  
22 claimed to be, but lest there be any confusion, I want to  
23 make that clear.

24 Now, you will also recall that both Huss and Smilow  
25 asserted before Judge Bauman that they should not be re-  
quired to testify because of what they said were certain

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

11  
rules of Jewish religious law.

You will recall references to that in the transcripts and you will recall references to that in the defense' summation just now.

Now, Judge Bauman advised both Huss and Smilow that this religious objection was not in fact a valid ground for refusing to testify.

I instruct you now, as a matter of law, that the religious objection was not a valid ground for refusing to testify.

I further instruct you that the religious objection is in no way a defense to the present criminal contempt case.

With all respect to defense counsel, I must instruct you that you are not entitled to consider, in your deliberations, the religious objection or the obedience to a higher law. You are not allowed to consider that on the question of whether either of these defendants is guilty of criminal contempt. That religious objection is not a valid defense here nor was it a valid ground for refusing to testify in the proceedings before Judge Bauman.

Our law, for obvious reasons, simply does not and cannot recognize the right of a member of any religious faith, whether it is Jewish, or Presbyterian, or Catholic,



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

12

or what, to refuse to testify in a criminal proceeding against another member of that faith, for an alleged religious reason.

You will further recall that Smilow, when he was asked to testify, asserted certain additional grounds for his refusal to testify. I think you will recall that he stated that he was being subjected to double jeopardy and that certain evidence had been unlawfully obtained by the government which gave information concerning him.

These were points of law which Smilow and his attorney related at that time to Judge Bauman.

Now, Judge Bauman held that none of these grounds asserted by Smilow constituted valid reasons for his refusal to testify, and none of these grounds presents any valid defense to the present criminal contempt case.

Let me summarize. A witness called in a court of law cannot refuse to obey a court order to testify because of certain personal religious reasons, as to any legal matter such as double jeopardy, and so forth. A witness cannot make his own private determinations. You can submit these arguments, as well as any asserted religious argument, or any argument whatever, to the court. He has a right to go to an appellate court beyond Judge Bauman, as occurred in this case, but once the courts have ruled against those



13

arguments, that witness is required to obey the court's order. He cannot simply go by his own private determinations and convictions.

Let me return to the element we discussed earlier. When I told you that the government must prove that the defendants refused to obey the orders of Judge Bauman knowingly and wilfully, the elements of knowingly and wilfully, I say, again, that the only issue here on that point is whether the particular defendant understood Judge Bauman's order and whether or not defendant consciously refused to obey those orders.

Now, as I said earlier, the government has the burden of proving the case. In this instance, as in any criminal case, the government has the burden of proving the case.

The government contends that it has done so by introducing the authentic transcripts of the hearing.

I should remind you here, as in every criminal case, that the defense doesn't have to prove its case. The sole burden is on the government, which contends it has done so, but the defense does not have to put in any evidence.

The defendants do not have to testify. Indeed, they have a Constitutional right in this proceeding not to testify. They are the defendants here. Huss and Smilow are the defendants in this trial as distinguished from the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

14  
defendants in the earlier trial.

As to this trial in this court, the government has the sole burden of proof. The defendants are not required to testify and you are not permitted to draw an inference in this trial simply from their failure to testify. The government doesn't even ask or suggest that such an inference be drawn.

The government contends that its proof is fully shouldered, the burden of proof is fully shouldered by the introduction into evidence of the transcripts.

Now, a few remaining points need to be covered. Under your oath as jurors you cannot allow a consideration of the particular punishment or speculation about punishment or sentence to enter into your deliberations or to influence you in any way. The duty of imposing sentence, in the event there is a conviction by the jury, rests exclusively on the court. Your function as jurors is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of the evidence and the law.

I think you will recall both from the transcript and the summations reference to unlimited punishment, or something of that kind, in a criminal contempt proceeding. Unless there will be any confusion in your mind, I think I

1 15

2 should say this as long as the point has come up: the  
3 statute does not itself specify a particular term of  
4 years, or a particular range, and that is what Judge  
5 Bauman was talking about when he made the reference he  
6 did. And the particular sentence to be imposed in the  
7 event of a guilty verdict would be up to me. But lest  
8 there is any confusion about the term "unlimited punish-  
9 ment," I can state categorically that there would be or  
10 could be nothing, in reality, which would involve unlimi-  
11 ted punishment, and as in any case, the court takes into  
12 account the nature of the conviction, the nature of the  
13 crime, and imposes a punishment commensurate with that.

14 As long as the point has come up, I think that should  
15 be cleared up lest there be any confusion.

16 Reference has also been made to the possible argument  
17 that the defendants have already suffered a penalty by  
18 virtue of being incarcerated for the civil contempt. I  
19 think it's already been explained to you, but I will reit-  
20 erate it.

21 In the course of a trial, when a judge is faced with  
22 a witness who refused to testify, the first thing the  
23 judge may do is to hold him in civil contempt and put  
24 him in jail to try to get him to testify. The judge is  
25 interested at that point in getting the trial going and

16

making sure the witnesses do their duty, and that's what's called a civil contempt proceeding, and the way for the witness to get out of jail at that point is to agree to testify, and the judge is trying to get him to testify by using punishment of that kind.

Now, a criminal contempt proceeding is of a completely different nature. The fact that there was a civil contempt proceeding is a completely irrelevant situation. It doesn't substitute for or prevent, or make unnecessary a criminal contempt proceeding, and if, in a given case, an attempt to obtain testimony fails, if the civil contempt proceedings fail, then the courts are free, and under certain circumstances are obligated to go ahead with a criminal contempt proceeding which constitutes or provides for a punishment for the breakdown of the entire proceedings.

So, in summary, you as jurors are not permitted in any way to consider that the civil contempt proceeding make unnecessary or invalidate, or affects this criminal contempt proceeding in any way. This is an independent proceeding, and you cannot consider that it is nullified or made unnecessary in any way by the prior contempt proceeding. Your focus has to be on what's before you in this court in this criminal contempt proceeding.

17

Now, finally, if you have, after your deliberations, a reasonable doubt about the guilt of either of the defendants, you should not hesitate for any reason to find a verdict of acquittal as to that defendant.

On the other hand, if you should find that the government has met its responsibility of proving a defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as to that defendant.

Now, when you retire to the jury room in a few minutes, I am certain that you will treat each other with consideration and with respect. If there are any differences of opinion which arise, I am certain that your discussions will be reasonable, calm, and carried out with dignity.

You are each entitled to your own opinion, and no juror should acquiesce in a verdict that is against his own personal particular judgment.

On the other hand, no one should enter a jury room with such pride in his own opinion that he refuses to change his mind no matter how intelligent is the argument of his fellow jurors. Discussion and deliberation are the basic elements of the democratic jury process, so if you have differences, take them and talk them out. Each

1 13

2 of you should decide the case for himself or for herself.

3 After thoroughly reviewing the evidence and  
4 frankly discussing it with your fellow jurors with an open  
5 mind and with a desire to reach a verdict, then and only  
6 then should each of you, individually, should decide the  
7 case for himself or for herself. If you do that, you will  
8 be acting in the true democratic tradition of our American  
9 jury system.

10 There are twelve of you on the jury. The  
11 alternates will be excused in a moment with the thanks of  
12 the court before the jury retires.

13 Any verdict of the jury, guilty or not guilty  
14 as to either one or both of the defendants, must be a  
15 unanimous verdict of all twelve jurors and must, of course,  
16 represent the honest conclusion of each of the twelve.

17 If you have any communications for the court,  
18 they should be submitted in writing through your foreman.  
19 Juror No. 1 will be the foreman unless for some reason  
20 she declines to act, and then the jury will elect someone  
21 else as the foreman. But if Juror No. 1 is willing to act  
22 as foreman, she will do so.

23 After your deliberations have been concluded,  
24 and when you are ready to announce a verdict, your foreman  
25 should send a note to the court saying that you have a



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

19

verdict and are ready to announce it.

There will be two marshals stationed outside your jury room, and they will convey any messages that you have.

When you send your note saying that you have a verdict, please don't say what the verdict is. The verdict should be announced in open court when we all gather and at that time you will need to announce your verdict of guilty or not guilty as to the defendant Huss, and then guilty or not guilty as to the defendant Smilow.\*

This concludes my charge. I would like to have you hold your places for a moment and I will give the lawyers an opportunity back in the robing room to tell me if there are any mistakes or anything to be corrected or added to the charge. I think it will just take a moment, and I think you could hold your places and give us that time to do that.

(In the robing room.)

THE COURT: All right. The government?

MR. GOLD: We have nothing, your Honor.

THE COURT: Mr. Chevigny?

MR. CHEVIGNY: I have no requests for additions.

I have some exceptions but they could be taken after you send the jury out.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

20

THE COURT: On basically the same grounds you made before?

MR. CHEVIGNY: Yes; on wilfullness, and I would except to your's Honor's charge with relation to the fact that you in effect stated that you would not give them an unlimited sentence. I would except to those two portions of the charge.

THE COURT: All right. Those are overruled.

(In the courtroom.)

THE COURT: There is no correction or additional charge that I will make.

And as to the alternates, you will be excused now. The jury can only deliberate as a jury of twelve. The clerk will tell you where to report.

Alternates, even in a short case, are a necessary insurance policy, so we thank you both very much, and the jury can now retire to deliberate.

(Two alternate jurors discharged.)

(The jury left the courtroom at 2:55 PM.)

1 ebh

2 (Time noted. 3:30 P.M.)

3 (In the robing room.)

4 THE COURT: I have a note. Received at 3:24 P.M.

5 The jury are ready with the verdict so we will call the jury  
6 back in and take the verdict.

7 (In open court. Jury present.)

8 THE COURT: Have you agreed upon a verdict?

9 THE FOREMAN: Yes, we have.

10 THE COURT: How do you find the defendant Huss?

11 THE FOREMAN: We the jury find Mr. Huss guilty.

12 THE COURT: How do you find for the defendant Smilow?

13 THE FOREMAN: We the jury find Mr. Smilow guilty.

14 THE COURT: Do the defendants wish the jury polled?

15 MR. CHEVIGNY: No, your Honor.

16 THE COURT: That concludes the proceedings with the  
17 jury. I thank you again. As I stated before I thank you  
18 for your attention and for your service and you have dis-  
19 charged your responsibilities well as good citizens and  
20 jurors. We thank you very much. I would suggest this: the  
21 jurors now, following their discharge from the case, are  
22 obviously free to speak to anyone they wish to speak to,  
23 whether it be attorneys, or the parties or anyone, or the  
24 press. But I would counsel you not to do so. I think that  
25 the jury's deliberations in a criminal case can well be

1 ebh

2 considered something made in confidence and I would advise  
3 and counsel you to keep your own counsel and not to discuss  
4 your deliberations with anyone whether it is an attorney,  
5 a defendant, family members of the defendants, friends of  
6 the defendants or people from the press. And certainly no one  
7 has a right to approach you or press you in any way. So  
8 with those instructions, again with my thanks, you are dis-  
9 charged.

10 And I would ask everybody in this courtroom to  
11 hold their places until the jury is off the floor.

12 (The jury was discharged.)

13 MR. GOLD: Your Honor, at this time I have an  
14 application on behalf of the government. We would move pur-  
15 suant to Title 18, United States Code, Section 3148 to have  
16 these defendants remanded on all three grounds specified  
17 in the statute.

18 First with regard to risk of flight. I think that  
19 risk is obvious in this case. It is my understanding that at  
20 least one of the defendants in the underlying fire bombing  
21 case has already fled. In light of the fact that these de-  
22 fendants are now convicted face unlimited punishment I don't  
23 think I need to say anything further about risk of flight.  
24 with regard to the defendant.

25 THE COURT: The term unlimited punishment is an



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

unfortunate term. Nobody faces unlimited punishment.

MR. GOLD: Punishment in the discretion of the court.

THE COURT: Okay.

MR. GOLD: With regard to the second element, danger to the community, evidence that was not presented in this court today which now I would like to bring to the court's attention is that Mr. Smilow in fact has pleaded guilty to arson arising out of the events of January 26th, 1972.

THE COURT: In what court and when was that?

MR. GOLD: That was in the New York State Supreme Court on November 27, 1972, before the Hon. Harry B. Frank.

THE COURT: Let me get that.

MR. GOLD: I have a copy.

THE COURT: What is the date please?

MR. GOLD: November 27, 1972. I have a copy of those minutes if your Honor would like me to hand them up.

THE COURT: Judge Frank?

MR. GOLD: Yes, sir.

THE COURT: What happened as a result of that guilty plea?

MR. GOLD: January 8th it was set for sentence and I do not believe that a jail sentence was handed out.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

THE COURT: All right. What else do you have?

GOLD: Mr. Huss as we know has refused to testify about the events leading up to and following the fire bombing. Consequently I would submit that with regard to his representing a danger to the community, that danger does in fact exist with respect to him as well.

Thirdly, in light of the extensive legal treatment that the Second Circuit has already given the issues in this case, and in addition, your Honor has already filed a rather extensive opinion regarding the legal issues in this case, I don't believe there now exists any serious appellate issue. And consequently I think the statute is clear that under these circumstances the defendants should be remanded at this time.

THE COURT: I would like to consider that in conjunction with the sentence date. Mr. Chevigny, I hate to even suggest it but I guess I will, would you give any consideration to an immediate sentence or sentence within the next week or so without waiting the usual six weeks for a pre-sentence report? Is there anything about the particular circumstances of this case that you or Mr. Gold might feel would make a regular pre-sentence report unnecessary? I don't know. I just wanted your comments.

MR. CHEVIGNY: I think it would influence your Honor

1 ebh

2 favorably.

3 THE COURT: All right. Then there is no question  
4 that we will certainly await the normal pre-sentence report.  
5 That means that there cannot be sentencing until early  
6 September.

7 MR. CHEVIGNY: Yes, your Honor.

8 I would like to be heard with relation to the  
9 remand issue.

10 THE COURT: Certainly. All right. Let's get  
11 our schedule fixed. I would then fix the sentence for  
12 1 o'clock on Wednesday, September 11th, and that will be  
13 in room 1505, and the pre-sentence reports are in order.

14 All right, let me hear you on the application  
15 for a remand.

16 MR. CHEVIGNY: Yes. The bail in this case has been  
17 extremely large, your Honor. It is \$50,000.

18 THE COURT: Who set the bail?

19 MR. CHEVIGNY: Judge Bauman, I believe.

20 MR. GOLD: I believe that's correct, your Honor.

21 MR. CHEVIGNY: It is enormous. For these defendants  
22 it's been an enormous burden for their families. I think  
23 there is an absolute assurance of their return. They have  
24 various ties in the community. Their families are here.  
25 Their families have supported them personally although not



1 ebh

2 their beliefs and what occurred here of course. Mr. Smilow  
3 is in school.

4 THE COURT: Let's take each man one at a time.  
5 Mr. Huss, how old is Mr. Huss now?

6 MR. CHEVIGNY: He's 18 now. He was 16 at the time,  
7 your Honor.

8 THE COURT: He's 18 now. And is he in school now?

9 MR. CHEVIGNY: He is not in school this summer.  
10 He is working for his father but proposes to go to school  
11 in the fall. Of course if he is serving --

12 THE COURT: He finished his school year?

13 MR. CHEVIGNY: He finished his school year and is  
14 out.

15 THE COURT: What school? Where and what?

16 DEFENDANT HUSS: Your Honor, I graduated from high  
17 school in '73 and before the summer for six months before  
18 that I went to night college at Staten Island Community  
19 College. I am presently preparing an application for New  
20 York University.

21 THE COURT: Were you in school fulltime last year,  
22 the '73-'74 year?

23 DEFENDANT HUSS: No, I wasn't. Partime.

24 THE COURT: You were partime at what, Staten Island?

25 DEFENDANT HUSS: Community College. Your Honor,



ebh

during the day I was fulltime employed.

THE COURT: Who did you work for during the day?

DEFENDANT HUSS: My father.

THE COURT: What business did your father have?

DEFENDANT HUSS: Huss Furniture Company.

THE COURT: Where is that located?

DEFENDANT HUSS: In Staten Island.

THE COURT: You live with your mother and father?

DEFENDANT HUSS: Until recently, yes.

THE COURT: Where do you now live?

DEFENDANT HUSS: I live with my father.

THE COURT: Is your mother deceased or what?

DEFENDANT HUSS: No. They are separated.

THE COURT: Is your mother living in New York City  
still?

DEFENDANT HUSS: In Staten Island; yes, sir.

THE COURT: Are you still in touch with your  
mother?

DEFENDANT HUSS: No.

THE COURT: Do you have brothers and sisters?

DEFENDANT HUSS: Yes, I do.

THE COURT: Tell me about them.

DEFENDANT HUSS: I have a brother who is 15. He  
will be 16 on September 11th. I have a sister that's 10 or

1 ebh

2 11. She is 11. Your Honor, during this time I am also  
3 parttime employed for a commercial photographer on Staten  
4 Island.

5 THE COURT: What is the name of the photographer?

6 DEFENDANT HUSS: His name is Jeffrey Klements.

7 THE COURT: Is there any other information about  
8 Mr. Huss that you want to present, Mr. Chevigny or Mr.  
9 Huss that you wish to present?

10 MR. CHEVIGNY: I would like to say more about  
11 the other issue raised--

12 THE COURT: I will tell you what would help me,  
13 if I could get the facts from Mr. Smilow and his residence.

14 MR. CHEVIGNY: Tell him where you live and  
15 what you are doing.

16 THE COURT: I live in Brooklyn with my parents.

17 MR. CHEVIGNY: What is the address?

18 DEFENDANT SMILOW: At 1050, 54th Street in Brooklyn.  
19 And I am presently attending City College.

20 BY THE COURT:

21 Q (To defendant Smilow) And do you have brothers  
22 and sisters?

23 A I have two brothers and no sisters.

24 Q How old are your brothers?

25 A My oldest brother is 27. And he is going to school

1 ebh

2 now.

3 Q Your other brother?

4 A My other brother is 26 and works by my father.

5 Q What business is your father in?

6 A We have a shirt factory.

7 Q What is the name of that factory?

8 A L & L Shirt Company.

9 Q Can you speak a little louder?

10 A L & L Shirt Company.

11 Q That is your father's company?

12 A Yes.

13 Q And your schooling?

14 A I am attending City College uptown now. I just  
15 completed my sophomore year. I am going to summer school  
16 now. And I am majoring in civil engineering.

17 THE COURT: All right Mr. Chevigny. What is the  
18 form of the bail? In each case.

19 MR. CHEVIGNY: There are family houses in both  
20 cases.

21 THE COURT: What security or what?

22 MR. CHEVIGNY: Security. Yes, as security for  
23 the \$50,000. The family houses have been put up in both  
24 cases.

25 THE COURT: In what form is the bail?



1 ebh.

2 MR. CHEVIGNY: A bond.

3 THE COURT: A bond.

4 MR. CHEVIGNY: Yes, sir. With real estate as  
5 security.

6 THE COURT: To the bondsman.

7 MR. CHEVIGNY: Mr. Smilow of course returned --  
8 well, both defendants have come to court every time. Mr.  
9 Smilow showed up for his sentencing on that arson charge  
10 in which he didn't know whether he was going to be sent to  
11 jail or not. As it happens he was not but he did appear  
12 on those times.

13 THE COURT: What sentence was given by Judge Frank?

14 MR. CHEVIGNY: It is in the record here and it  
15 was taken out. Let me see if I can give it to you. It is  
16 an E felony. He got five years' probation, your Honor.

17 THE COURT: Any fine?

18 MR. CHEVIGNY: No, no fine.

19 MR. GOLD: I think that the likelihood of flight  
20 and the like and the close relationships of these young men  
21 to their families and the family homes is very small.

22 MR. CHEVIGNY: With relation to danger to the  
23 community I must confess I find the U.S. Attorney's remarks  
24 opaque on that point.

25 I would say this and I will say it again at the

1 ebh

2 sentencing: I don't intend to excuse what happened here.  
3 I know that someone died and so do the defendants, but  
4 they didn't think that there was going to be a fire bomb  
5 there. They didn't intend to commit an act of violence  
6 that would injure anyone. I know that someone did do it  
7 and I don't condone it and they don't either but they didn't  
8 propose to commit an act of violence that would injure  
9 someone then. They are not violent people, and I think that  
10 whatever their sentence, I think that their experience  
11 with relation to this has been sobering if not frightening  
12 in that they in no way represent a danger to the community.  
13 With relation to the legal issues, your Honor has made a  
14 decision but nevertheless I think the issue is open with  
15 relation to whether we had the right to raise anew those  
16 issues because this was an entirely new proceeding being  
17 a criminal contempt and I do intend to raise those issues.

18 Finally I would like to say this: Mr. Smilow  
19 being in summer school has invested some time and energy  
20 in getting into summer school, and it would even if in fact  
21 your Honor does remand them at the time of sentence as you  
22 would of course, and there is no possibility of -- or if there  
23 turns out to be no bail pending appeal it would nevertheless  
24 be much less disruptive to their lives and I think it would  
25 be fully as much carry out the terms of the court if they

1 ebh

2 were to be remanded at the time of sentence because Mr.  
3 Smilow is now in school and it would enable them to arrange  
4 their lives so that they would be able to serve whatever  
5 sentence it is your Honor intends to give. I should think  
6 that this was most particularly a case in which a remand  
7 is not appropriate because it seems to me that there is no  
8 likelihood of flight, and no danger to the community from  
9 the presence of the defendants at large pending the sentence.

10 MR. GOLD: Your Honor, may I be heard briefly  
11 in opposition?

12 THE COURT: Certainly.

13 MR. GOLD: Judge Bauman was very frank in his  
14 comments about the conduct of these defendants. He described  
15 it. It was introduced into evidence in this case. He  
16 described their conduct as the deliberate frustration of a  
17 murder prosecution. Mr. Chevigny tells us that now the  
18 defendants say we didn't know anyone would be killed.  
19 Unfortunately I have no information that leads me to conclude  
20 that they have in any way ceased their affiliation with the  
21 Jewish Defense League. And however worthy or unworthy those  
22 objectives might be, one never knows when those activities  
23 will lead to violence.

24 Secondly, with regard to the likelihood of flight,  
25 I don't have personal knowledge about the family backgrounds



1 ebh

2 of the defendants in the fire bombing case who actually did  
3 flee. Consequently I can't respond that the situation of  
4 these defendants is far different from the situation of  
5 those defendants.

6 THE COURT: What information have you got about  
7 who has fled in the way of defendants or witnesses?

8 MR. GOLD: Your Honor, it is my understanding  
9 that two of the defendants in the underlying fire bombing  
10 case did flee the country.

11 THE COURT: Who were they?

12 MR. GOLD: Mr. Zellerkraut, I believe is one,  
13 and I believe there's one other.

14 THE COURT: Who else was there?

15 MR. GOLD: Your Honor, I just can't specify  
16 at this time. I believe another one did as well. But certainly  
17 Mr. Zellerkraut did, and I am not in a position to disclose  
18 to your Honor what his family situation was.

19 THE COURT: I remember Judge Bauman was impressed--  
20 let me just back up. Judge Bauman committed the defendants  
21 on the civil contempt charge, isn't that right?

22 MR. GOLD: Correct.

23 THE COURT: Then there was the appeal to the Court  
24 of Appeals on the civil contempt charge.

25 MR. GOLD: That's correct.

1 ebh

2 THE COURT: Were these defendants incarcerated  
3 on the civil contempt charge all the time that that appeal  
4 was being heard?

5 MR. GOLD: Your Honor, my understanding of that is--

6 THE COURT: Is that right, Mr. Huss and Mr.  
7 Smilow?

8 DEFENDANT HUSS: Yes.

9 DEFENDANT SMILOW: Yes.

10 MR. GOLD: That's right.

11 THE COURT: So then there was the proceeding  
12 on the 27th of June, 1973, and criminal contempt proceedings  
13 were instituted shortly thereafter. Now Judge Bauman set  
14 bail, right?

15 MR. GOLD: That's correct.

16 THE COURT: Okay.

17 MR. GOLD: Of course at that time they were  
18 presumed to be innocent of the charges on which they have  
19 just been convicted. Consequently, in terms of one's motive  
20 to flee, the motive was not as extensive then as it clearly  
21 is now. So I don't think the fact that Judge Bauman deemed  
22 it appropriate to fix bail on June 27, 1973, at the time  
23 charges were about to be filed is dispositive of the question  
24 of whether or not there remains the likelihood to flee now  
25 that they have been convicted.

1 ebh

2 THE COURT: Well, how about the point of the  
3 security? Their parents.

4 MR. GOLD: Two parents face--

5 THE COURT: Homes are security for \$50,000 bond.

6 MR. CHEVIGNY: That certainly is extensive bail. I  
7 am not prepared to tell your Honor --

8 THE COURT: That bail was set by Judge Bauman.  
9 Now what do you say to that. Mr. Chevigny argues that the  
10 family ties are presumably strong enough to prevent the  
11 callous act of flight which would sacrifice the families'  
12 homes, and in one family home there is the father. Mr. Huss,  
13 does anybody live with your father?

14 MR. CHEVIGNY: His mother lives in the family home.

15 THE COURT: I thought you said your mother and  
16 father were separated.

17 DEFENDANT HUSS: That's right. I live with my  
18 father. My mother is in custody of the home.

19 THE COURT: She has the home?

20 DEFENDANT HUSS: That's right.

21 THE COURT: And who lives with her in the home?

22 DEFENDANT HUSS: My sister.

23 THE COURT: Your sister?

24 DEFENDANT HUSS: Yes, sir.

25 THE COURT: And then you have a brother 15. Who

1 ebh  
2 does he live with, Mr. Huss?

3 DEFENDANT HUSS: My brother lives with myself  
4 and my father.

5 MR. GOLD: Your Honor, do I correctly understand  
6 that the fathers of both of these defendants are privately  
7 engaged in business? If that's the case, at the very least  
8 I would ask that if your Honor is inclined to fix a cash  
9 bail, that bail be fixed in the increased amount of \$100,000.

10 THE COURT: Well, let's just take it one step  
11 at a time. We have the home in which Mr. Huss' mother resides,  
12 and the home in which Mr. Huss' 10-year old sister resides.  
13 That home is security for the \$50,000 surety bond. That home  
14 is security to the bondsman, right?

15 MR. CHEVIGNY: Yes, it is. I am told by Mr.  
16 Huss' father that it is jointly held by him and his wife  
17 as far as ownership goes. That it would be a detriment to  
18 both of them, if the home were lost because it is jointly  
19 owned.

20 THE COURT: That's security to the bondsman, right?

21 MR. CHEVIGNY: Yes.

22 THE COURT: And then we have got the home of Mr.  
23 and Mrs. Smilow in which -- who lives in that home? Mr. and  
24 Mrs. Smilow?

25 DEFENDANT SMILOW: Yes.



1 ebh

2 THE COURT: And you live there?

3 DEFENDANT SMILOW: And my brothers.

4 THE COURT: And both of your brothers?

5 DEFENDANT SMILOW: Yes.

6 MR. CHEVIGNY: Your Honor, I would like to say  
7 something.

8 THE COURT: Okay.

9 MR. CHEVIGNY: Of course, the defendants were  
10 presumed innocent in a technical sense but we all know from  
11 what happened today that apart from the procedural issues  
12 that we raised, their conviction was close to a foregone  
13 conclusion. It was not like other criminal cases. They could  
14 have fled if they had wished to. They made an issue of  
15 principle about this, and their principle was not hurting,  
16 not injuring others who were their associates. Now they were  
17 wrong as a matter of law about that. You so charged the  
18 jury, and the jury so found. But I can't see any reason  
19 to believe that the kind of people who wouldn't testify  
20 against their fellow members in an organization, would make  
21 that much of a point of honor of something, could conceivably  
22 run away to some foreign country and ruin the lives of their  
23 parents. They made that issue partly on an issue of religion.  
24 Their parents are not the same religion. It seems to me totally  
25 illogical to me that these are the sorts of persons who would

1 ebh

2 go to jail or refuse to testify against other members of  
3 their organization, would then flee and wreck the lives  
4 of their parents and brothers and sisters. I find that  
5 incredible even to suggest.

6 THE COURT: I know Judge Bauman set bail, but  
7 when he was talking about the civil contempt -- and I don't--

8 MR. CHEVIGNY: I think he said--

9 THE COURT: He was concerned about the possibility  
10 of flight, and he remarked about the possibility of flight  
11 to Israel in this kind of a situation, and let's get that  
12 reference clear.

13 MR. GOLD: Your Honor, I can furnish it to you.  
14 It begins at page 261 of the transcript.

15 MR. CHEVIGNY: 271.

16 MR. GOLD: I have it at 261. That's where he begins  
17 discussing how Elbogen was--

18 MR. CHEVIGNY: Oh, I have it.

19 I am told and I believe it to be true that Mr.  
20 Elbogen and Mr. Zellerkraut didn't jump bail. They were--  
21 if it makes any difference. They were not subpoenaed or  
22 in the position of these defendants at the time that they went  
23 to Israel.

24 THE COURT: What Mr. Jaffe said at that point, the  
25 government lawyer is "We have at least three witnesses



1 ebh

2 for the government who are not available to the government.  
3 I know that two of them are in Israel. One of those witnesses  
4 was served with a subpoena and ailed to comply with the order  
5 and has not appeared in the United States. Another one of  
6 those witnesses is some place in Israel but is one step  
7 ahead of the people who are trying to serve him. In  
8 addition, Elbogen, who was another witness that the witness  
9 sought to obtaink is nowhere to be found. So there is no  
10 indication that any of those three people jumped bail. They  
11 fled at the outset.

12 MR. GOLD: Your Honor, I don't mean to suggest--

13 THE COURT: And the government did I guess suggest  
14 the 50,000 cash or surety bond. At least that's what Mr.  
15 Jaffe was talking about there in the event bail might be  
16 appropriate. And Judge Bauman at page 263 talks about the  
17 incentive to flee because of being a defendant that was not  
18 present before. Judge Bauman set bail here, did he?

19 MR. CHEVIGNY: The next page your Honor.

20 THE COURT: This is the portion of the transcript.  
21 We are not talking about civil contempt. We are talking  
22 about bail for the criminal contempt, right?

23 MR. CHEVIGNY: Yes, sir.

24 THE COURT: Could I see page 264 of the minutes.  
25 What would be the timing of appeal?

1 ebh

2 MR. CHEVIGNY: Well, there is ten days to file  
3 the notice and the 40 days to complete the record. I take  
4 it that I would do it within that time. It is a 50-day  
5 total overall from the time of sentence. But of course  
6 the issue of bail on appeal is a somewhat different issue  
7 from this one. Frankly I am a little surprised by this. I  
8 had expected these defendants --

9 THE COURT: Who would be responsible? Suppose that--  
10 who does the defendant apply to for bail after a sentence,  
11 the district court or --

12 MR. CHEVIGNY: Both. First you -- well, either.  
13 First to you and then to the Court of Appeals if you should  
14 deny it.

15 THE COURT: Frankly I think there are some serious  
16 conflicting factors here. First of all, I think that the  
17 time of this whole program has been extensive. The criminal  
18 trial in the other matter was in June of '73. And the  
19 criminal contempt proceedings were initiated promptly but  
20 for a variety of reasons the criminal contempt trial has  
21 been delayed over a year. It was nobody's fault but it still  
22 happened. There was a change of counsel for the defendants,  
23 and then discovery motions were made by the new counsel  
24 and so forth.

25 So we are in July of '74 getting this tried

1 ebh

2 instead of July of '73 and apparently it was impossible  
3 to try it in July of '73, but still it means that this whole  
4 proceeding, which should have gone promptly on trial, has  
5 been quite extensive in terms of time.

6 Secondly, I don't see any real basis for appeal.  
7 That is certainly not my prerogative to decide what the  
8 Court of Appeals would do, but it seems to me that this is  
9 an unusual case. The Court of Appeals had the issues before  
10 it in the civil contempt matter and held that there was  
11 no just cause for refusing to answer, and it would be  
12 surprising to me if the Court of Appeals held something  
13 different now.

14 It is possible but for the sake of my view of the  
15 bail situation, I have got to regard the appeal as a very,  
16 very unlikely thing.

17 Secondly, as far as the sentence, I want to hear  
18 the submissions of the defendants and their counsel and I  
19 would want to consider very, very carefully all information  
20 in the pre-sentence report. But it would seem to me ex-  
21 tremely unlikely that a prison sentence would not be imposed.

22 MR. CHEVIGNY: I agree.

23 THE COURT: Now, I haven't even come to the risk  
24 of flight yet, but as far as the risk of flight, I feel that  
25 the court at this juncture should not run any appreciable

1 ebh

2 of flight. The criminal case was frustrated and if for  
3 any reason these defendants or even one of them should  
4 escape the lawful processes of this court, it would simply  
5 be a mockery, and nothing in this world can ever be made  
6 absolutely certain and bail is never certain but I think  
7 it should be held to an absolute minimum risk in this case.  
8 This is a case where I think special precautions are  
9 warranted if the court's authority is to be enforced.

10 On the other hand, Mr. Chevigny, I appreciate  
11 your argument about the adequacies of the bail. I think it  
12 would be a very callous act on the part of either of these  
13 men to flee and subject their homes to seizure, and it is  
14 difficult to think that anyone would do that.

15 Let me peruse the statute a minute and see what  
16 I can find on a couple of points

17 (Pause)

18 THE COURT: I am going to order the defendants  
19 remanded for the following reasons:

20 I believe under the terms of Section 3148 that  
21 an appeal in this action under the present circumstances is  
22 basically frivolous. I would not go so far as to say it was  
23 taken for delya. I don't impute any such motives to you Mr.  
24 Chevigny under any circumstances, but to me it is a matter  
25 or it would be a matter of form and despite all good

1 ebh

2 intentions it really would be frivolous.

3 And that, as I understand it, is in itself sufficient  
4 cause for directing remand. The provision is in the statute  
5 "If such a risk of flight or danger is believed to exist  
6 or if it appears that an appeal is frivolous or taken for  
7 delay, the person may be ordered detained."

8 So my view of the lack of substance of an appeal  
9 here is sufficient reason in itself for ordering remand or  
10 detention immediately.

11 Added to that, I repeat that this is a situation  
12 where I think the court should not run any appreciable risk  
13 of flight because this is the last remaining shred of legal  
14 enforcement to a serious criminal prosecution which was  
15 begun as a result of the fire bombings of the two agencies and  
16 the death of the secretary back in January, 1972. This is  
17 all that remains, and the authority of the court cannot be  
18 flouted, and no appreciable risk can be taken of flouting  
19 that authority by taking, by running any substantial or  
20 appreciable chance that either of these defendants will flee.

21 I recognize that \$50,000 bail has been given  
22 for each of these defendants in the form of a surety bond,  
23 and that those bonds are securities for homes, but these  
24 defendants have run risks, taken positions which might appear  
25 completely irrational to many of us, and I cannot exclude

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ebh

the possibility that another irrational act of some kind might occur.

Finally, as I have already stated, the procedure we are involved in has already been extended too long, and with the lack of substance as I view it in an appeal, I think it is time to certain at least make sure that the court's authority is enforced and that there is no possibility that there is any flight or avoidance of the court's authority.

A prison term is a virtual certainty although the amount of the prison term has to be carefully weighed in view of all the circumstances that will be presented to me in September.

As far as the convenience of the defendants in connection with their school schedule, that is a matter I cannot take into account. They have been at liberty a full year before this trial. They have been at liberty a full year since the contempt proceeding was initiated and before the case even got to trial. They have had more time at liberty than would normally be expected. Consequently, the main objective we all have to take care of now is to see that the jury's verdict, and the processes of the court are enforced and in view of that I will direct their immediate remand.

Court is adjourned.

--



WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
-------------	---------------	--------------	-----------------	----------------

John Gross	22			
------------	----	--	--	--

Richard Huss	59			
--------------	----	--	--	--

EXHIBIT INDEX

<u>Government</u>	<u>Identification</u>	<u>In Evidence</u>
-------------------	-----------------------	--------------------

1		22
---	--	----

1A, 1B, 1C, 1D		22
----------------	--	----

2A, 2B, 2C, 3		22
---------------	--	----

4A, 4B		22
--------	--	----

1  
2 UNITED STATES OF AMERICA

v.

3 RICHARD HUSS and  
4 JEFFREY H. SMILOW

73 Cr. Misc. 24  
73 Cr. Misc. 25

5 July 31, 1974,  
6 1 P.M.

Before:

7 Hon. Thomas P. Griesa,  
8 District Judge.

Present:

9  
10 Robert Gold, Assistant U.S. Attorney,  
For the Government.

11 Paul Chevigny, Esq.,  
12 For the Defendants.

13 --

14 MR. GOLD: Government ready, your Honor.

15 MR. CHEVIGNY: Defendants ready.

16 THE COURT: Mr. Gold, do you have any statement?

17 MR. GOLD: Your Honor, it is my understanding that  
18 Mr. Chevigny has statements to make on behalf of the de-  
19 fendants. With your Honor's permission, I would like to  
20 be heard at the conclusion of his remarks.

21 THE COURT: All right.

22 Mr. Chevigny?

23 MR. CHEVIGNY: Thank you, your Honor.

24 Your Honor, I know from talking to my clients  
25 that you received the Probation report, which is undoubtedly

1 Jgh

2 very thorough, and that you have received letters and  
3 other communications from the community about these de-  
4 fendants. I don't need to tell you that they are not the  
5 usual criminal defendants. They are very young men. Mr.  
6 Huss was 16 and Mr. Smilow was 17 at the time the events  
7 here occurred. They do not have any criminal past. Their  
8 sole connection was with a political group, the Jewish  
9 Defense League.

10 They have been defiant of the rules  
11 of this court, of the orders of this court, in part because  
12 they are truthful. You heard Mr. Smilow testify. He testi-  
13 fied to things that were said to him by others, he testified  
14 in a manner that I think is characteristic of the truth,  
15 that he took the action that he had taken here.

16 They are young men who are educating themselves.  
17 Were it not for the events that occurred in this case they  
18 would have a clear record, and they have a promising future  
19 and something to contribute as working members of society.  
20 I think that much must be clear to your Honor.

21 Now, what happened here was a very tragic accident.  
22 The defendants did not understand the enormity of the crime  
23 that was being committed. They did not suppose that there  
24 would be a fire bomb. Of course people are responsible  
25 for the consequences of their acts that they commit, even

1 jgh  
2 if those acts are not deliberate. But here is a case where  
3 the events which occurred are tangential to the crime,  
4 the criminal intent of the defendants.

5 Your Honor had occasion to say some time when we  
6 talked about remanding the defendant to the trial to  
7 comment that this was the last shred of a hold that this  
8 court had on the underlying events arising out of the in-  
9 dictment of Messrs. Cohen and Davis and others. If there  
10 is any feeling that the punishment for that crime should  
11 spill over onto these defendants, I would like to point out  
12 that, dealing solely with the punishment for those crimes,  
13 I think the record of these defendants and the Probation  
14 report would show that they are classically good risks for  
15 probation. If it is desired to punish for the underlying  
16 crime, I would like to point out that --

17 THE COURT: Let's clear that up. You just now  
18 started talking about the underlying crime and you started  
19 saying that they did not understand that there would be  
20 certain consequences that occurred.

21 These men have not been convicted of the under-  
22 lying crime. They are not going to be sentenced for the  
23 underlying crime. I think you, in a way, are treading in  
24 deep water or beginning to tread in deep water when you begin,  
25 as you did, to describe the events of the underlying crime,

1 jgh

2 to try to show what they did or did not do.

3 I don't mean to cut you off, but if you start tell-  
4 ing me about the degree of responsibility for the underlying  
5 crime, I might find it necessary to let the government talk  
6 about its version of the underlying crime, and I really think  
7 that that gets us into something we cannot do in the present  
8 posture of the case.

9 So I will assure you of something which is ab-  
10 solutely obvious, that these men have not been convicted of  
11 the underlying crime and they won't be sentenced for it. That's  
12 that.

13 MR. CHEVIGNY: Thank you, your Honor. I will go on  
14 to another point I wanted to raise. I don't have a great  
15 deal to say on this point. I would like to say that because  
16 of the posture in which this case fell out, these defendants  
17 are suffering principally for the sins of others. It is true  
18 they were called as witnesses, but the government has an in-  
19 formant in this case, who was Mr. Seigel, and Mr. Seigel  
20 carried a heavy burden of guilt with relation to the events  
21 that occurred in the underlying crime, and because of his  
22 cleverness, because of his understanding of what was going on  
23 when others did not understand, he was able to, in the case  
24 which went up to the Court of Appeals on the civil contempt,  
25 he was able to escape guilt for the charge of contempt because

1 jgh

2 of motions that had been made on his behalf by his lawyers  
3 and because of things that he himself had done.

4 He was originally the government's chief witness  
5 and he had been a government informer throughout the entire  
6 proceedings, I mean not in legal proceedings but throughout  
7 the entire transaction. And in fact I would like to say  
8 that it seems to me that these young men have been called  
9 before this court and subjected to these penalties in  
10 effect because of the cleverness of Mr. Seigel, because he  
11 was able to make use of the government in a very special,  
12 ingenious kind of way and to escape testifying, and in effect  
13 even because he was able to use the cover of his government  
14 informer status to enable him to participate in the crime  
15 and to escape all punishment for it, to obtain immunity  
16 for it and to ultimately avoid testifying. It came down on  
17 these young boys.

18 And it seems to me that it would be extraordinary  
19 irony to let the government's chief witness, who could have  
20 given evidence here, escape for procedural reasons, if the  
21 punishment were to come down on these boys because of Mr.  
22 Seigel's participation in the crime and because of the  
23 posture that he was able to put the case in.

24 But I think, your Honor, your Honor has read the  
25 reports and understand what promising young men these are



1 jch  
2 with relation to the usual probation situation and I  
3 recognize that the big problem in your mind must be with  
4 relation to the deterrent effect. A criminal contempt is  
5 almost entirely a deterrent crime.

6 The punishment is meted out for a criminal contempt  
7 primarily for the purpose of suggesting to others that they  
8 may not refuse to testify. And so it may be, with these  
9 defendants, that your Honor may feel that it is necessary  
10 to impose a severe sentence in order to deter others, and  
11 I would like to suggest why that is not appropriate, why this  
12 case is not like other cases involving a refusal of witnesses  
13 to answer.

14 What was done here was done for political reasons,  
15 because of solidarity with friends, and for religious reasons.  
16 I don't suggest that that makes it not a crime, but it  
17 affects the relationship of this case to other contempt  
18 cases and to other witnesses who may in the future refuse to  
19 testify.

20 It was not through fear or intimidation or any of  
21 the usual means that these young men were prevented from  
22 testifying. It was entirely a matter of principle. It is not  
23 the sort of thing which is the subject of coercion. Other  
24 witnesses who do such things as a matter of principle will  
25 not be coerced any more than these witnesses are.

1 jgh

2 Your Honor's releasing them would not suggest  
3 to others that because they are subjected to intimidation  
4 or fear they may refuse to answer. This is a specialized  
5 type of case, this case in which they refuse to answer  
6 because of religious and political principles, and in accord-  
7 ance with that I would suggest that it hasn't any deterrent  
8 effect or it has a very minimal deterrent effect, on other  
9 witnesses.

10 In the light of the fact that --

11 THE COURT: Why doesn't it have almost a broader  
12 need for deterrence if you have a ground for refusal to  
13 testify which is of some broad significance, and there is  
14 a ground asserted here of refusal for religious reasons  
15 to testify? Now, if that were allowed to go without some  
16 meaningful punishment, that would perhaps have broader  
17 implications, would it not, than some special problem relat-  
18 ing to intimidation that relates solely to the individual  
19 case? And this is really, is it not, a matter of a general  
20 problem of law enforcement?

21 MR. CHEVIGNY: I think not, your Honor. I think  
22 that persons who do things for issues of principle are really  
23 uncoercible. Your Honor could sentence them to a long sentence  
24 but it would not coerce them nor coerce other witnesses who  
25 take a similar position.

1 Jgh

2 In addition, when you raise the general problem  
3 of law enforcement, I have to say that that relates back to  
4 the earlier point that I raised, which is that the case is  
5 cast in an extraordinary mold because the effect of this  
6 is that those who might have had some knowledge of it but  
7 were not the government's appointed witnesses originally are  
8 to be punished whereas a person who was deeply involved in  
9 the crime at the same time, the government informer, has gone  
10 free; and if one speaks of a general problem of law enforce-  
11 ment, I think it would be detrimental to the atmosphere of  
12 law enforcement to punish these defendants entirely when the  
13 person principally responsible and who in fact was accepted  
14 as a government informer has succeeded in escaping.

15 I would like to emphasize once more that the usual  
16 rehabilitative effects that a prison sentence is supposed to  
17 have with relation to defendants I venture to say has no  
18 relation with respect to these defendants. There is nothing  
19 that a prison sentence can do for them, and I suggest that  
20 their incarceration would be futile for them and would be futile  
21 for the United States.

22 THE COURT: Do you make any argument or do you make  
23 any request for the application of the youthful offender pro-  
24 visions?

25 MR. CHEVIGNY: Yes, your Honor. I would think that

jgh  
the youthful offender provisions are appropriate, especially to 5010(a), Section 5010(a), of Title 18. I would urge your Honor to suspend the imposition of sentence and place the defendants on probation.

THE COURT: Now, if I did not feel that I could suspend the imposition or discussion of a sentence and deal solely on the basis of probation, my next question to you is, do you argue for or do you make any request for the application of the provisions in 5010(b) or any other part of the youth offender --

MR. CHEVIGNY: Yes, I would, your Honor, because of my view that the federal prison authorities would take the view that a long incarceration of them would not be appropriate. Accordingly I think that they would be quickly released.

THE COURT: Have you got 5010(b) before you?

MR. CHEVIGNY: I have..

THE COURT: Okay. Does 5010(b) really apply in a case like this? 5010(b) says:

"If the court shall find that a convicted person is a youth offender and the offense is punishable by imprisonment under applicable provisions of law other than this sub-section, the court may in lieu of the penalty of imprisonment otherwise provided by law sentence the youth

1 jgh  
2 offender to the custody of the Attorney General for treat-  
3 ment and supervision pursuant to this chapter until dis-  
4 charged by the division as provided in Section 5017(c)."

5 And then 5017(c) says:

6 "A youth offender committed under Section 5010(b)  
7 of this chapter shall be released conditionally under super-  
8 vision on or before the expiration of four years from the  
9 date of his conviction and shall be discharged unconditionally  
10 on or before six years from the date of his conviction."

11 The first question I ask you is a question of law.  
12 There is no specific term of imprisonment or range of terms  
13 of imprisonment provided for criminal contempt. But I suppose  
14 you would argue, and I think that probably would be right,  
15 that nevertheless 5010(b) could apply because imprisonment  
16 certainly is as a matter of law possible; it can be the  
17 sentence in a criminal contempt case.

18 MR. CHEVIGNY: It would be Catch 22. Because if  
19 you could put them in prison, and not because they couldn't  
20 be sentenced under 5010(b), then it would automatically  
21 become true that they could be sentenced under 5010(b), if you  
22 follow me.

23 THE COURT: Would you argue that if I could not use  
24 probation entirely you would request a commitment under  
25 5010(b) and 5017(c) under which they could be held up to four

1 Jch  
2 years, right?

3 MR. CHEVIGNY: Yes, your Honor.

4 THE COURT: I don't mean to put you on that kind  
5 of a spot. Your argument would be that the federal authori-  
6 ties -- you would foresee them keeping these men a lot less  
7 than four years.

8 MR. CHEVIGNY: Yes. I also urge your Honor that  
9 prisons contain notoriously bad company and notorious schools  
10 for crime and I think to send young men of this background  
11 to prison would run the risk of worsening the situation  
12 and I would most strongly urge you to consider probation  
13 because of the age, the posture of the case with relation  
14 to other persons, and their background.

15 THE COURT: Let's not go too far on calling the  
16 prisons schools for crime. I think I have visited a few  
17 prisons recently and I think that is not quite so. But, anyway,  
18 I get your point.

19 Do you have anything else, Mr. Chevigny?

20 MR. CHEVIGNY: Not at this point. If Mr. Gold  
21 should raise something that I haven't thought of, I would like  
22 an opportunity to be heard.

23 THE COURT: Mr. Huss, do you have any statement you  
24 wish to make?

25 DEFENDANT HUSS: No, I don't, your Honor.



1 jch

2 THE COURT: All right. Mr. Smilow, do you have  
3 any statement you wish to make?

4 DEFENDANT SMILOW: No, sir.

5 THE COURT: All right. Mr. Gold?

6 MR. GOLD: Thank you, your Honor. I am troubled by  
7 something Mr. Chevigny said. He focused some of his remarks  
8 on what has become of Mr. Seigel. What he failed to state  
9 and what is the undisputed fact in this case is that although  
10 Mr. Seigel did get immunity, each of these defendants also  
11 got immunity. Each of these defendants told Judge Bauman  
12 he understood what having been granted immunity meant, and  
13 nonetheless each repeatedly refused to obey Judge Bauman's  
14 orders.

15 Mr. Chevigny also used the phrase "The enormity  
16 of the crime." In using that phrase his remarks were focused  
17 narrowly on the fire bombing. He did not refer to the  
18 enormity of the crime of which these defendants now stand con-  
19 victed.

20 Judge Bauman, on the other hand, had some very  
21 definite views on the enormity of that crime in a criminal  
22 contempt and he said, reading from page 258 of the trial  
23 transcript, a portion of which was received in evidence in  
24 this case, marked Government's Exhibit 3, he said, "It is  
25 inconceivable to me that anybody would be thinking of

1 jgh  
2 proceeding in a manner that would limit punishment to six  
3 months. I therefore want every letter observed. I want the  
4 case to proceed to a jury trial and I want the judge, who-  
5 ever he is, to have in mind my views, as I have expressed  
6 it previously this morning, of the seriousness with which I  
7 view the frustration of a murder prosecution. People may  
8 do that, but the law will make them pay."

9 Now, as your Honor knows, following the refusal of  
10 these two defendants to testify at the underlying fire  
11 bombing trial, three counts in that indictment were dismissed.  
12 However, two counts presently remain open, and the United  
13 States Attorney's office represents that it is prepared to  
14 go forward with that prosecution should the necessary wit-  
15 nesses materialize.

16 And in that regard I would say that what your Honor  
17 does here this morning, despite what Mr. Chevigny represents,  
18 may well have terribly significant impact on bringing those  
19 named defendants to justice.

20 THE COURT: I want to be clear. The original indict-  
21 ment was three counts?

22 MR. GOLD: The original indictment was five counts,  
23 including conspiracy. Counts 4 and 5 that now remain open  
24 charge criminal possession of unlawful explosive devices  
25 pursuant to --

1 jgh

2 THE COURT: Who are those counts directed against?

3 MR. GOLD: Sheldon Davis, Stuart Cohen and Sheldon  
4 Seigel in count 5 and the same defendants in count 4, with  
5 the addition of Jerome Zellerkraut, also known as Jerry  
6 Zeller. According to my information he is presently in  
7 Israel.

8 THE COURT: Give me that again.

9 MR. GOLD: Count 4 charges Sheldon Davis, Stuart  
10 Cohen, Sheldon Seigel who has immunity as I understand it,  
11 and Jerome Zellerkraut, also known as Jerry Zeller, and it is  
12 my information that he has fled the country and is now in  
13 Israel.

14 Count 5 charges each of those defendants with the  
15 exception of Mr. Zellerkraut.

16 THE COURT: What has happened to counts 1 through 3?

17 MR. GOLD: They were dismissed by Judge Bauman  
18 for failure to prosecute as a result of a lack of witnesses  
19 at the trial.

20 THE COURT: Do you know why the --

21 MR. GOLD: Two counts remain open? That was Judge  
22 Bauman's order and I am not clear on the narrow reason for  
23 that rule.

24 THE COURT: Is there any possibility of the  
25 government prosecuting counts 4 and 5 without the testimony

1 jgh  
2 of Mr. Huss and Mr. Smilow?

3 MR. GOLD: It is my understanding there is  
4 a possibility that, should another witness materialize who  
5 is presently out of the country, that case can be brought  
6 and prosecuted.

7 THE COURT: But right now, I take it, there aren't  
8 witnesses presently available on counts 4 and 5, right?

9 MR. GOLD: Correct.

10 THE COURT: Do you have anything further?

11 MR. GOLD: No.

12 THE COURT: Mr. Chevigny, do you have anything  
13 further?

14 MR. CHEVIGNY: No. I think I've said enough, your  
15 Honor.

16 THE COURT: Let me make a short statement. Both the  
17 defendant Huss and the defendant Smilow have been convicted  
18 after a jury trial on the basis of a jury verdict of the  
19 crime of criminal contempt. That crime was committed by both  
20 the defendants in June of 1973 before Judge Bauman. The crime  
21 was their refusal despite patient warnings by Judge Bauman,  
22 despite the clearest possible legal rulings by Judge Bauman,  
23 despite the affirmance of those legal rulings by the Court  
24 of Appeals in connection with the civil contempt proceedings.

25 Judge Bauman specifically warned each defendant

1 jgh

2 that his refusal to purge himself of the contempt then and  
3 there would subject him to a trial for criminal contempt,  
4 and Judge Bauman warned that the penalty would undoubtedly  
5 be a prison term of more than six months, and therefore Judge  
6 Bauman set in motion the judicial mechanism under which  
7 a jury trial was held so that the court would have the power  
8 to impose a sentence of more than six months.

9 The jury trial has been held and the sentencing  
10 matter is before me.

11 Obviously my sentence is not predetermined by  
12 what Judge Bauman did or said, but the facts of what went on  
13 before Judge Bauman, the conduct of these men, is of course  
14 the case on which my sentence must be based.

15 I stated earlier, and I think it is very important  
16 to have in mind, that any sentencing of mine handed down today  
17 is not a sentencing for the underlying crime of fire bombing  
18 in connection with the events of January, 1972, at the  
19 Columbia Artists office and the Sol Hurok office. That was the  
20 underlying crime which Judge Bauman was attempting to try and  
21 it was the criminal trial in which Mr. Huss and Mr. Smilow  
22 were called to testify.

23 But I must start my consideration with the fact  
24 that Judge Bauman was attempting to try not a routine criminal  
25 case, if any criminal case could be called routine, but one

1 Jgh

2 of aggravated seriousness, involving a terrifying type of  
3 crime and the death of a perfectly innocent young woman.

4 So it was of great importance for the government  
5 to prosecute that crime, to attempt to bring those responsible  
6 to justice, and that's what the government was attempting  
7 to do, and the court was attempting to try that case, a very  
8 important matter indeed.

9 Mr. Huss and Mr. Smilow each were granted immunity  
10 from prosecution of any personal responsibility they may  
11 have had in connection with those events, and following  
12 the grant of immunity it was their duty to testify and assist  
13 the court and the jury to find out the truth about what went  
14 on in connection with those serious matters of January, 1972.

15 Mr. Huss and Mr. Smilow were called upon to tell  
16 the truth in order to assist the carrying out of the ad-  
17 ministration of justice in this country, relating to a very  
18 serious problem and crime. They refused to do so and therefore  
19 committed a crime themselves, as the jury has found.

20 The religious grounds which they asserted for  
21 their refusal and other grounds they also asserted, those  
22 matters have been discussed with great thoroughness by Judge  
23 Bauman, by the Court of Appeals, and the legal rulings have  
24 been conclusively laid down that those grounds were not  
25 valid grounds for refusing to do their duty as citizens and



1 jgh

2 to tell the truth in this court of law.

3 I have received a great number of letters from  
4 people who are anxious to assist Mr. Huss and Mr. Smilow  
5 and to urge that they be treated with leniency at the time  
6 of this sentence. Many of those letters urge strenuously  
7 that these men had a right on religious grounds to refuse  
8 to testify. I mean no disrespect to the authors of those  
9 letters, but frankly I am surprised about the misconception  
10 which they seem to display. I cannot imagine in this country  
11 any valid religious grounds for refusing to testify against  
12 someone indicted for a crime, whether it is asserted by  
13 a person of the Jewish faith or a person of the Catholic  
14 faith or Protestant or whatever. That kind of thing simply  
15 cannot be permitted if we are to protect our citizens against  
16 serious crimes.

17 I have discussed with Mr. Chevigny the question  
18 of whether the provisions of the Federal Youth Corrections  
19 Act should be applied. 18 USC, Section 5006 defines a youth-  
20 ful offender as a person under the age of 22 years at the time  
21 of conviction. Mr. Smilow is now 19. Mr. Huss is now 18.  
22 So application of that statute must be considered. Mr.  
23 Chevigny on behalf of these defendants asks for it to be  
24 considered.

25 However, upon consideration I find that treatment

1 jgh  
2 or probation under that statute is not appropriate. Specifi-  
3 cally I find, with regard to 18 USC, 5010(a), that both  
4 Mr. Huss and Mr. Smilow require commitment and I find that  
5 it would be inappropriate to suspend the imposition or execu-  
6 tion of sentence and place either of these men on probation.

7 With respect to Sections 5010(b) and 5010(c), pro-  
8 viding for treatment and supervision in lieu of imprisonment,  
9 I specifically find that because of the nature of the offense  
10 neither Mr. Huss nor Mr. Smilow would derive benefit from  
11 the treatment contemplated under these provisions, nor would  
12 such treatment be appropriate.

13 The materials which have been submitted to me  
14 do not indicate that there is any real necessity for re-  
15 habilitation as far as the events with which we are involved  
16 here. Undoubtedly this is a unique situation. I have no  
17 reason whatever to believe that either of these young men  
18 will be involved in this type of problem again. It is ob-  
19 viously unique and not subject to repetition.

20 It seems to me that the purpose of sentence and  
21 punishment in this case is to enforce the law, to vindicate  
22 the power of the court, to require citizens to perform this  
23 important duty of testifying. That is the beginning and the  
24 end of the purpose of sentence and punishment in this case,  
25 and those purposes are not, in my view, served by the

1 jgh

2 application of the treatment and supervision provisions  
3 of the Federal Youth Corrections Act.

4 Let me say one other thing as a prelude. I repeat  
5 that the sentence should not be viewed by me or anybody  
6 else as being imposed for the underlying crime. This  
7 sentence cannot be viewed as a means of punishment for that  
8 crime. This sentence is imposed solely for the criminal  
9 contempt committed.

10 Under all the circumstances, I believe that the  
11 following sentences should be imposed and I hereby impose  
12 them:

13 The defendant Huss is sentenced to a term of  
14 imprisonment for one year and the defendant Smilow will be  
15 sentenced to a term of imprisonment of one year.

16 I am willing to discuss surrender dates if there  
17 is any desire to request anything particular in that regard,  
18 Mr. Chevigny.

19 I am sure you are well aware of this, but of  
20 course I will formally advise you, each of you, that you  
21 have the right to appeal. If you cannot afford counsel,  
22 the court will entertain an application to appoint counsel  
23 for you. I think that is true of both Mr. Huss and Mr.  
24 Smilow.

25 All right, Mr. Chevigny.

1 jgh

2 MR. CHEVIGNY: It is Mr. Smilow's birthday  
3 tomorrow. If they could go in on Monday, it would make the  
4 families happy. I ask your Honor for that much.

5 THE COURT: All right.

6 MR. GOLD: Your Honor, I would like to state  
7 that I obviously have no objection.

8 THE COURT: I don't think that is the slightest  
9 problem.

10 The surrender date will be fixed. Each defendant  
11 will be directed to surrender at 10 A.M., August 5th.

12 MR. CHEVIGNY: Thank you. Would your Honor  
13 entertain an application for bail pending appeal at this time  
14 or would you prefer to have it on papers?

15 THE COURT: I think we ought to settle it now.

16 MR. CHEVIGNY: All right.

17 THE COURT: And this brings us back to some of the  
18 considerations we were involved in earlier.

19 MR. CHEVIGNY: Yes, your Honor.

20 THE COURT: Just to recap, at the time of the  
21 jury verdict I ordered their immediate remand and revoked  
22 bail because I felt that there was no valid ground for appeal  
23 here, the matter already having been up to the Court of  
24 Appeals during this civil contempt proceeding. As you know,  
25 I called a hearing subsequently and on my own motion reheard

1 jgh  
2 the matter and felt that I had perhaps misconstrued the  
3 bail statute and that at that particular juncture prior  
4 to sentencing I could not remand simply because of the lack  
5 of merit in an appeal. We are at a different procedural  
6 juncture now and I want to look at the statute again.

7 MR. CHEVIGNY: 3148 of 18 USC, your Honor.

8 THE COURT: What?

9 MR. CHEVIGNY: 3148.

10 THE COURT: 3148.

11 (Pause)

12 THE COURT: I really would feel constrained at  
13 this point to apply the provision of 3148 about the appeal  
14 being frivolous or taken for delay, and I would order the  
15 surrender on August 5th. I have in mind all the considera-  
16 tions we went into before about the family connections  
17 and so forth. I have that very vividly in mind. But from  
18 my own viewpoint, the District Court, and considering the  
19 particular record here, the fact that the matter has been up  
20 to the Court of Appeals, as I said, I think that there is  
21 really nothing of substance left for an appeal. So I would  
22 direct that each defendant surrender on Monday, August 5th,  
23 and I would not wish to stay that or allow bail pending  
24 an appeal.

25 MR. CHEVIGNY: Under Rule 9(b) of the Rules of

1 jgh

2 Appellate Procedure it provides for the court to state its  
3 reasons in writing. I have had some confusion in appealing  
4 these things. I would simply ask your Honor at some time  
5 before or on August 5th to state your reasons, however  
6 briefly, in writing, even if in one sentence. If your Honor  
7 would simply state that your reason is that you find  
8 the appeal to be frivolous, or whatever it is your Honor  
9 wishes to say, if you would state it in writing--

10 THE COURT: Direct my attention to that, please.

11 MR. CHEVIGNY: Rule 9(b) of the Rules of Appellate  
12 Procedure, the second sentence.

13 THE COURT: All right. I am glad you called my  
14 attention to that.

15 Let me just get your specific application. What  
16 is it?

17 MR. CHEVIGNY: My application would be for bail  
18 pending appeal.

19 THE COURT: I will deny that application for the  
20 reasons stated on the record and I will get out a short  
21 memorandum this afternoon.

22 MR. CHEVIGNY: I don't ask your Honor to go to  
23 that much trouble. If you could endorse something, I think  
24 that would be sufficient.

25 THE COURT: I don't have anything to endorse. I will



1 jgh

2 get out a short memorandum this afternoon. I think that's  
3 all I can do.

4 MR. CHEVIGNY: My last request is that defendants  
5 have had some trouble in the West Street jail in relation  
6 to kosher food, which apparently is available but isn't  
7 given without an order of the court.

8 THE COURT: That will be ordered.

9 MR. CHEVIGNY: I would ask, your Honor, if you  
10 would accept my submission of an order to you, a written  
11 order, that kosher food be given.

12 THE COURT: Certainly.

13 MR. CHEVIGNY: Thank you.

14 --

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
ONLY COPY AVAILABLE

GOVERNMENT'S TRIAL EXHIBITS

100-475  
100-710

GOV'T

EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

125

STATES OF AMERICA

VS.

STUART COHEN, SHELDON DAVIS  
and SHELDON SEICEL.

72 Cr. 715

72 Cr. 770

Before: HON. ARNOLD BAUMAN, D.J.

New York, June 8, 1973;

10.30 A.M.

The Court is now in session.

MR. JUSTICE: The government recalls Mr. Hoss.

RICHARD HUSS, called as a witness by the  
Government, duly affirmed by the Clerk of the Court,  
testified as follows:

ONLY COPY AVAILABLE

Gov't  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

326

Huss - direct

137

THE COURT: Denied.

All right. Go ahead.

DIRECT EXAMINATION

BY MR. JAFFE:

Q Would you state and spell your name, please?

A Richard Huss.

Q Will you tell us where you live?

A 5 Staten Island Boulevard.

Q Would you tell us your age?

A I respectfully decline to answer this series of questions on the grounds that my testimony may tend to incriminate me. Also it is my understanding of the Jewish Law that I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish Law made binding on me is itself a further violation of basic Jewish Law.

MR. JAFFE: Your Honor, at this time we would hand up to the Court an application we attempted to file last week with regard to immunity for Mr. Huss.

I will hand a copy of that application to Mr.

ONLY COPY AVAILABLE

22 Miller, and I will hand to the Court a letter, the original  
23 of a letter from Henry E. Petersen, Assistant Attorney  
24 General, authorizing the United States Attorney to make that  
25 application.

Gov't

EXHIBIT

U. S. DIST. COURT  
S. D. OF N. Y.

1C

15 BY MR. JAFFE:

16 Q Mr. Huss, directing your attention to January 26,  
17 1972, specifically, to the morning of that day, did you  
18 see the defendants Stuart Cohen and Sheldon Davis on that  
19 day?

20 THE COURT: Before you answer that question, Mr.  
21 Huss, I want to explain to you that I have just signed an  
22 order which confers immunity on you, and which prevents the  
23 use of anything you say against you.

24 I am going to give you a moment or so to think  
25 as you like, Mr. Huss, to talk to your lawyer so that he can

ONLY COPY AVAILABLE

2 explain to you the legal significance of what it is I have  
3 done in signing this order I have just signed.

4 You may step down.

5 MR. JAFFE: Your Honor, before the witness steps  
6 down, would the Court also admonish the witness that it is  
7 the Court's opinion that the other basis stated for refusal  
8 to answer, specifically the religious grounds, is not a  
9 valid basis and that he consult about that?

10 THE COURT: Yes, Mr. Huss, your lawyer knows the  
11 case of United States v. Smilow, I have no doubt, but another  
12 Judge of this Court has ruled upon that same objection in  
13 the case of Mr. Smilow, and has held it to be not a valid  
14 ground for refusal to answer.

15 The substance of what I have said is that I agree  
16 with the ruling of that Judge, Judge Weinfeld by name, with  
17 respect to the claim based upon religious scruples, and  
18 advise you that it is not a proper basis on which you may  
19 refuse to answer.

GOV'T  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

THE COURT: The objection based on religious grounds is overruled.

MR. MILLER: I except.

THE COURT: I would like you to talk to your client, please, explain to him -- you may step down, Mr. Huss -- the significance of the order I have just signed.

MR. JAFFE: Shall we proceed with Dr. A. Allen?

THE COURT: We will take a five-minute recess because I want counsel to have an opportunity to talk to his client.

(RECESS.)

EXAMINATION BY MR. JAFFE:

Q Mr. Huss, directing your attention to the morning of January 26, 1972, did you see Sheldon Davis on that morning?

A I respectfully decline to answer this series of questions on the grounds that it is my understanding of Jewish law I am prohibited from testifying as another Jew in a non-Jewish tribunal and on the grounds

ONLY COPY AVAILABLE



2 that any contrary interpretation of Jewish law made against  
3 me is a further violation of the Jewish law.

4 THE COURT: Do you understand I have over-  
5 ruled that objection?

6 THE WITNESS: Yes, your Honor.

7 THE COURT: All right.

8 Q Mr. Hues, on the morning of January 26, 1972,  
9 did you drive in a car with Sheldon Davis and other  
10 people from Long Island into Manhattan?

11 A I respectfully decline to answer --

12 THE COURT: You may say same declination.

13 THE WITNESS: Yes, your Honor.

14 THE COURT: You decline to answer on the same  
15 ground?

16 THE WITNESS: Yes, sir.

17 MR. JAFFE: Would you order the witness to  
18 answer that?

19 THE COURT: I order you to answer the question, Mr.  
20 Witness.

21 A Same declination.

22 Q Mr. Hues, on the morning of January 26, 1972,  
23 did you have a discussion with Mr. Davis and other  
24 individuals concerning the business of an office  
25 at the premises of either Hueso Concepts, Incorporated

2 or Columbia Management Artists, Incorporated?

3 MR. SLOTHICK: I object to the form of the  
4 question.

5 THE COURT: Overruled.

6 You may answer.

7 ~~A~~ Same declination.

8 THE COURT: I order you to answer.

9 A Same declination.

10 Q Mr. Huss, on the morning of January 26, 1972,  
11 did you go with an individual named Jerome Zellerkraut,  
12 also known as Jerry Zeller, to the offices of Murec  
13 Concerts and there place an attache case and ignite it?

3 THE COURT: Go ahead.

4 Q Would you answer that question, Mr. Huss?

5 A Same declination.

6 THE COURT: I order you to answer, Mr. Huss.

7 A Same declination.

8 Q What time of day time on the morning of January 26,  
9 1972, in the company of Sheldon Davis, Jerome Zellerkraut  
10 also known as Jerry Zeller, Murray Elbogen and an individual  
11 named Murray Elbogen?

12 A Same declination.

20 THE COURT: Overruled.

21 You may answer.

22 A Same declination.

23 THE COURT: I order you to answer, Mr. Huss.

24 A Same declination.

Q Mr. Huss, prior to January 26, 1972, within a

2 period of time from about two weeks before that date, that  
3 is, from two weeks before January 26, 1972, through January  
4 26, 1972, did you have any discussions with Sheldon Davis  
5 or Stuart Cohen or with the individuals Murray Elgoban,  
6 Jeffrey Smilow or Jerome Zellerkraut concerning placement  
7 of any attack bombs or incendiary devices at either Harco  
8 Corp., Inc., or Columbia Artists Management?

19 THE COURT: I understand that. I don't  
20 regard this as a charade at all. He is asking questions  
21 that bear on the allegations of the indictment. The  
22 witness has consistently refused to answer and is heading  
23 in the direction of a contempt, and I shall deal with that  
24 at the appropriate time.

ONLY COPY AVAILABLE

19 THE COURT: You may answer.

20 A Same declination.

21 THE COURT: I order you to answer.

22 A Same declination.

23 THE COURT: I don't really see much point in  
going on.

24 MR. JAFFE: We were going to inquire whether  
2 it was his intention to give the same declination if other  
3 questions were put to the witness.

4 THE COURT: You may answer that.

5 THE WITNESS: Yes.

6 MR. JAFFE: At this time we would ask that the  
7 Court make the finding that Mr. Huss is in contempt of this  
8 Court and ask that he be remanded to the custody of the  
9 Attorney General until such time during this proceeding  
10 that he be recalled and give testimony before this Court.

11 THE COURT: Before you say anything -- I will  
12 tell you, I court -- Mr. Huss, I find you in contempt of  
13 this Court. There are two kinds of contempt that I  
14 want to tell you about.

15 One is civil contempt, which provides for your  
16 incarceration during the course of this proceeding but  
17 to leave the keys to the prison with you in that if you  
18 decide to answer at any time you will be released.

19 The second kind of contempt is a criminal

contempt which does not look for answers but is meant as  
ONLY COPY AVAILABLE

11 punishment for your contemptuous conduct in refusing to  
12 answer questions.

I instruct you, sir, that a civil contempt does

I find that you are in contempt of court.

235

Gov't  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

2A

xx

21

J E F F R E Y      S H I L O W,      called as a witness by

22

the Government, being affirmed, testified as follows:

ONLY COPY AVAILABLE



Exhibit

## EXHIBIT

U. S. DIST. COURT  
S. D. OF N. Y.

28

DIRECT EXAMINATION

BY MR. JAMES:

Q Mr. Smiley, would you tell us your age, sir?

A 18.

Q I don't hear you.

A 18.

THE COURT: He said 18.

ONLY COPY AVAILABLE

5 BY MR. JAFFE:

6 Q Mr. Sollow, directing your attention to January  
7 26, 1972, and on that day during the morning, see  
8 Sheldon Brown or Stuart Cohen?

9 A I refuse to answer on the ground that to require  
10 me to respond to the question would violate my Constitutional  
11 right of freedom of worship as a committed and observant  
12 Jew under the First Amendment to the United States Consti-  
13 tution and that to compel me to answer said question would  
14 violate my right of freedom of worship as a committed and  
15 observant Jew in that under traditional Jewish Law I didn't  
16 testify in any case where I am to receive an advantage or  
17 benefit because of my testimony against individuals.

18 I refuse to answer the question on the ground that  
19 I presently am charged with committing on January 26, 1972 at  
20 about 9:25 a.m., at 165 West 57th Street, New York, a crime  
21 of arson.

22 I refuse to answer on the ground that to require  
23 me to respond to the question would violate my right to  
24 remain silent which is a right guaranteed by the Fifth Amendment  
25 of the United States Constitution.

ONLY COPY AVAILABLE

2 I respectfully refuse to testify against myself.  
3 I further refuse to testify on the basis that the Government  
4 obtained information illegally by allowing a co-defendant  
5 to act as an informant and to participate in taped conver-  
6 sations with me.

7 I further respectfully refuse to answer on the  
8 basis that I have already been put in jeopardy for the same  
9 proceeding and I have been already punished although that  
10 proceeding was dismissed.

11 MR. CHASE: With regard to the witness' refusal to  
12 answer on the basis that he refuses to testify against  
13 himself, the Government at this time makes application to  
14 grant immunity to the witness. We hand up to the Court the  
15 original application and copies of the original letters and  
16 we hand a copy of the immunity application to his attorney.

17 MR. SLOTHICK: May defense counsel have a copy of  
18 that, your Honor.

19 MR. JAFFE: I will hand a copy to defense counsel  
20 so they both may take a look at that, your Honor.

21 MR. SLOTHICK: Thank you, Mr. Jaffe.

22 THE COURT: There is a blank in the date of filing  
23 in the order...

24 MR. CHASE: I will file that, your Honor.  
25 your Honor.

2 THE COURT: On May 31st?

3 MR. JAFFE: That's correct.

4 THE COURT: Mr. Smilow, I have just signed an  
5 order that confers upon you immunity against the use of  
6 anything that you are required to testify to in this courtroom.  
7 Do you understand that?

8 MR. SMILOW: I understand.

9 THE COURT: Do you want a reasonable time to talk  
10 to your lawyer about the significance of the order I have  
11 just signed?

12 A No.

13 THE COURT: The witness says no. Go ahead.

14 MR. FLENNICK: Your Honor, for the record, my  
15 silence should not be an indication of approval other than  
16 just I am constrained to act under your Honor's prior  
17 ruling.

18 THE COURT: I understand, yes. You have a con-  
19 tinuing objection to these entire proceedings, both of  
20 you?

21 MR. JAFFE: Your Honor, with regard to the other  
22 basis raised by the witness with regard to his religious  
23 objection, the religious objection is almost in haec verba  
24 and is properly raised. Judge Weinstein has determined to  
25

2 be insufficient, affirmed by the Second Circuit in the First  
3 Smilow case by Judge Feinberg; and we would ask the Court  
4 to instruct the witness with regard to his religious bases  
5 that in fact he has no religious basis on which he may decline  
6 to answer questions under the First Amendment.

7 THE COURT: Yes. You understand that so far as  
8 your assertion of a privilege, whether it be constitutionally  
9 based or religiously based, I do not find that that is an  
10 appropriate reason for refusing to answer proper questions,  
11 and I should direct you to answer such questions as I  
12 deem proper.

13 THE COURT: I think the record should indicate  
14 that the witness has been purged of any animosity and is  
15 now in a position to answer questions in Title 18

2 be insufficient, affirmed by the Second Circuit in the First  
3 Smiley case by Judge Feinberg; and we would ask the Court  
4 to instruct the witness with regard to his religious bases  
5 that in fact he has no religious basis on which he may decline  
6 to answer questions under the First Amendment.

7 THE COURT: Yes. You understand that so far as  
8 your reference to a prejudice, whether it be constitutionally  
9 based or religiously based, I do not find that that is an  
10 appropriate reason for refusing to answer proper questions,  
11 and I should direct you to answer such questions as I  
12 deem proper.

13 MR. JAFFE: With regard to the refusal to answer  
14 based upon his indictment or his plea to arson in the  
15 New York State Court, we would ask that this exhibit be  
16 marked Exhibit 5, Court Exhibit 5 for the Court to take  
17 judicial notice of the fact that the witness has on November  
18 27, 1972 entered a plea of guilty to an E Felony for the  
19 arson he was charged with, and that his refusal to testify  
20 based on any type of First Amendment ground is covered by the  
21 immunity that the Court has just conferred upon him.

22 (Court Exhibit 5 marked.)

23 THE COURT: I think the record should indicate



2 U. S. Code, Section 6003.

3 MR. JAFFE: With regard to his other basis for  
4 refusing to testify--

5 THE COURT: Just a moment. 6002 is the order  
6 that I made. In any event you understand that now immunity  
7 has been conferred upon you, do you not?

8 A Yes.

9 MR. JAFFE: With regard to his other basis, your  
10 Honor, the witness refuses to answer based on two assertions,  
11 one that he has been placed in double jeopardy in that he was  
12 on a previous occasion held in contempt for refusing to  
13 testify. We ask the Court to instruct him that that is an  
14 insufficient basis for refusing to now testify before a  
15 hearing held in front of the Court.

16 THE COURT: I so instruct the witness.

17 MR. JAFFE: With regard to his refusal to answer  
18 based on the discovery of this witness by the existence of  
19 tapes which led to the discovery of the witness Sheldon  
20 Seigel, we would ask the Court to instruct him that that too  
21 is no basis on which he may refuse to testify.

22 THE COURT: Yes, the witness is so instructed.

23 BY MR. JAFFE:

24 Q Mr. Seigel, did you on that date meet with Sheldon Davis, and in  
25 1972, did you on that date meet with Sheldon Davis, and in

2 Murray Elbogen, Jerome Cellerkrant, and Richard Huss?

3 THE COURT: You need not read the entire thing,  
4 Mr. Smilow. You may say "same declination" if that is what  
5 you want to do.

6 A Same declination?

7 MR. JAFFE: I didn't hear the answer.

8 THE COURT: He said "same declination".

9 MR. JAFFE: Would the Court direct the witness  
10 to answer that question.

11 THE COURT: I order you to answer that question.

12 THE WITNESS: Same declination.

13 Q Mr. Smilow, who did you prior to January 26, 1972  
14 have any conversations with Stuart Cohen or Sheldon Davis  
15 concerning your agreement with them to take an attache  
16 case to the premises of Columbia Artists Management, Inc.  
17 to there ignite a fuse contained in that attache case and  
18 in fact on the 26th?

19 THE COURT: Mr. Jaffe, don't tell a story. Just  
20 read a lawyer-like question, please.

21 MR. JAFFE: Let me withdraw the question.

22 Q Prior to January 26, 1972, did you have a conver-  
23 sation or conversations with Sheldon Davis and with Stuart  
24 Cohen concerning your involvement in going to Columbia  
25 Artists Management?

ONLY COPY AVAILABLE

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

A Same Declination.

THE COURT: I order you to answer, sir.

THE WITNESS: Same declination.

Q As a result of that conversation, or any conversations, did you on the 26th of January 1972 go with certain individuals from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Did you on the 26th of January 1972 go with an individual to the premises of Columbia Artists Management?

A Same Declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I think that is enough, Mr. Jaffe. Why don't you ask him one question to the effect as to whether or not he intends to decline on those grounds?

2C  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.

5 BY MR. JAMES: ...  
6 Q ... your attention to the month of June 1972  
7 Mr. Shallow, did you have any conversations with Sheldon  
8 Coigol?  
9

A Same declination.

15 THE COURT: What did you say?

16 THE WITNESS: Same declination.

17 THE COURT: I order you to answer.

18 THE WITNESS: Same.

19 Q Mr. Shallow is it your intention that to any other  
20 questions that I put to you that you will give the same  
21 declination and refuse to answer?

22 MR. SHALLOW: I object to that your Honor as not  
23 being part of the ...

24 THE COURT: ...

25 Q Sir?

ONLY COPY AVAILABLE

2 THE COURT: Answer it?

3 THE COURT: You decline to answer whether you will  
4 continue to answer?

5 THE WITNESS: I will answer the same way.

6 THE COURT: You will answer the same way. All  
7 right.

8 THE COURT: At this time, your Honor, the Govern-  
9 ment would ask the Court under Title 23, Section 1826A to  
10 find that this witness is in contempt of Court and the  
11 Government's suggestion is that the Court order he be  
12 remanded to the custody of the Attorney General for the dura-  
13 tion of this proceeding until such time as he gives testimony  
14 before this Court.

15 THE COURT: Mr. Smilow, I want to explain something  
16 to you.

17 I am about to hold you in civil contempt. That  
18 means that I am going to order that you be placed in the  
19 custody of the Attorney General for the duration of the  
20 trial unless in the interim, in the meanwhile you indicate  
21 your willingness to answer the questions you have declined  
22 to answer today.

23 Do you understand?

24 THE WITNESS: Yes, I do.

25 THE COURT: That is civil contempt, and the

2 of civil contempt is to induce you to break your silence.

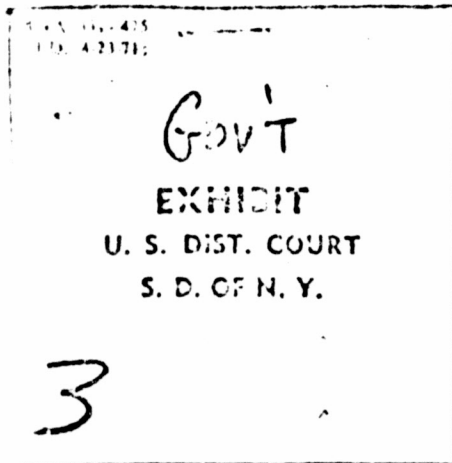
3 There is another kind of contempt which is called  
4 criminal contempt, which has as its purpose punishment  
5 for the crime of contempt. The two are not exclusive. Do  
6 you understand what I have just told you?

7 THE WITNESS: Yes.

8 THE COURT: All right, Mr. Sullivan. The Court  
9 finds you in civil contempt and it is the order of the Court  
10 that you be committed to the custody of the Attorney General  
11 for the duration of the trial or until such time as you  
12 answer the questions which you have declined to answer today.

ONLY COPY AVAILABLE





17 R I C H A R D H U S S, having been duly affirmed,  
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. JAFFE:

21 Q Mr. Huss, do you know an individual named Sheldon  
22 Davis?

23 A The Court of Appeals has ruled that my prior  
24 refusal to answer questions in this proceeding on the grounds  
25 that to answer any questions would be a severe violation

2 of the teachings of my religion and cannot be recognized  
3 by an American court as a basis for not testifying. With  
4 all due respect to the decision of the Court of Appeals  
5 and of the honorable tribunal, I find that the cardinal  
6 precepts of my religion must take precedence in my mind.  
7 Therefore I respectfully decline to answer any questions  
8 on the religious principles stated in my prior declinations  
9 before this honorable tribunal.

10 THE COURT: I direct you to answer. I order you  
11 to answer.

12 THE WITNESS: Same declination.

13 MR. JAFFE: Excuse me just a minute, Judge.

14 THE COURT: Before this goes any further,  
15 Mr. Huss, I want to tell you something: I explained the last  
16 time that your failure to answer questions when I have  
17 ordered you to answer constituted contempt of court. I told  
18 you that my having committed you for civil contempt does not  
19 preclude the bringing of charges of criminal contempt against  
20 you.

21 I again want to advise you of that and I want  
22 to make other things abundantly clear to you, Mr. Huss.

23 One, I am going to ask the United States Attorney  
24 to comply with the provisions of Rule 42B and proceed against  
25 you for criminal contempt if you persist in your refusal to

2 answer. I for one regard your refusal to answer as criminal  
3 contempt.

4 I want further to advise you, Mr. Huss, that  
5 for criminal contempt there is no limit upon the amount of  
6 punishment which can be imposed upon you for that crime.  
7 Is that clear?

8 THE WITNESS: Yes, your Honor.

9 Q Mr. Huss, do you know an individual named  
10 Stuart Cohen?

11 A Same declination.

12 MR. JAFFE: Would your Honor direct the witness?

13 THE COURT: I order you to answer.

14 THE WITNESS: Same declination.

15 Q Do you know an individual named Murray Elbogen?

16 A Same declination.

17 THE COURT: I order you to answer.

18 THE WITNESS: Same declination.

19 Q Do you know an individual named Jeffrey Smilow?

20 A Same declination.

21 THE COURT: I order you to answer.

22 THE WITNESS: Same declination.

23 Q Do you know an individual named Sheldon Seigel?

24 A Same declination.

25 THE COURT: I order you to answer.

2 THE WITNESS: Same.

3 Q Do you know an individual named Jerome Zellerkraut?

4 THE COURT: Yes?

5 MR. ZWEIBON: Your Honor, I think we have gone --

6 THE COURT: I don't think so. Go ahead.

7 Q Do you know an individual named Jerome Zellerkraut?

8 A Same declination.

9 THE COURT: I order you to answer.

10 THE WITNESS: Same declination.

11 Q Directing your attention to the 25th of January,  
12 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen,  
13 Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

14 A Same declination.

15 THE COURT: I order you to answer.

16 THE WITNESS: Same declination.

17 Q Directing your attention to the 26th of January,  
18 1972 did you see Murray Elbogen, Jeffrey Smilow, Sheldon  
19 Seigel or Jerome Zellerkraut?

20 A Same declination.

21 THE COURT: I want to again advise you that your  
22 refusal to answer these questions over my order constitutes in  
23 my view criminal contempt of court, and I want you to have  
24 that in mind.

25 I now order you to answer.

2 THE WITNESS: Same declination.

3 Q Directing your attention , Mr. Huss, to the morning  
4 of January 26, 1972, would you tell the Court who you saw,  
5 that is, what persons you saw on that morning?

6 A Same declination.

7 THE COURT: I order you to answer.

8 THE WITNESS: Same declination.

9 MR. MILLER: Excuse me, your Honor. The witness  
10 has made it clear in my mind that he will not answer.  
11 I see no purpose in this continuing.

12

13

14

15

16

17

18

19

20 Q Mr. Huss, on the morning of January 26, 1972  
21 did you go in a motor vehicle with Sheldon Davis, with  
22 Jeffrey Smilow and Murray Elbogen and with Jerome Zeller-  
23 kraut and drive in an automobile from Brooklyn to Manhattan?

24 A Same declination.

25 THE COURT: I order you to answer.

2 THE WITNESS: Same declination.

3 Q Had you prior to the morning of January 26, 1972  
4 agreed with Sheldon Davis and Stuart Cohen that you and  
5 Jerome Zellerkraut would go to the offices of Sol Hurok?

6 A Same declination.

7 MR. SLOTNICK: I object to the form of the  
8 question.

9 THE COURT: Overruled, same order. I order you to  
10 answer.

11 THE WITNESS: Same declination.

12 Q Mr. Huss, did you on the morning of January  
13 26 deliver any attache case along with Jerome Zellerkraut  
14 to the offices of Sol Hurok?

15 A Same declination.

16 THE COURT: I order you to answer.

17 THE WITNESS: Same declination.

18 THE COURT: I again advise you that your continued  
19 refusal to answer these questions over my direction constitutes  
20 criminal contempt of court.

21 Go ahead.

22 Q Mr. Huss, prior to the morning of January 26, 1972  
23 or on the morning of January 26, 1972 did you have any dis-  
24 cussions with Sheldon Davis, Stuart Cohen, Sheldon Seigel,  
25 Jerome Zellerkraut, Murray Elbogen or Jeffrey Smallow about



354

2 carrying an attache case to the offices of Hurok Concerts,  
3 Incorporated?

4 MR. SLOTNICK: I object to the form of the  
5 question.

6 THE COURT: Overruled.

7 Answer, please.

8 THE WITNESS: Same declination.

9 THE COURT: I direct you to answer.

10 THE WITNESS: Same declination.

11 Q Mr. Huss, were you ever part of any plan to  
12 deliver any incendiary devices to either Hurok Concerts,  
13 Incorporated or Columbia Artists Management on the morning  
14 of January 26, 1972?

15 MR. SLOTNICK: I object to the form of the  
16 question.

17 THE COURT: Overruled.

18 A Same declination.

19 THE COURT: I order you to answer.

20 THE WITNESS: Same declination.

21 MR. JAFFE: Your Honor, may I have a moment?

22 THE COURT: Yes.

23 (Pause.)

24 THE COURT: I want the record to indicate at this  
25 point that immunity has been conferred upon this individual

2 previously.

3 Are you aware of that, Mr. Huss?

4 THE WITNESS: Yes.

5 THE COURT: And you have been aware of that all  
6 morning, have you not?

7 THE WITNESS: Yes, your Honor.

8 MR. ZWEIBON: If your Honor please, for the sake  
9 of the record I don't want to pop up everytime with this type  
10 of objection and --

11 THE COURT: You may rise every time you have  
12 an objection to make.

13 MR. ZWEIBON: So that we will make it in duet.

14 THE COURT: What is on your mind?

15 MR. ZWEIBON: The same things, the loading of the  
16 witness, the matter of form, the length of this type of  
17 interrogation.

18 THE COURT: Overruled.

19 Q Mr. Huss, on the morning of January 26, 1972  
20 did you leave an incendiary device contained in a black  
21 attache case in the offices of Sol Hurok, Hurok Concerts,  
22 Incorporated?

23 A Same declination.

24 THE COURT: I order you to answer.

25 THE WITNESS: Same declination.

2 Q Mr. Huss, on the morning of January 26, 1972 at  
3 around 9:30 did you meet in Manhattan with Jerome  
4 Zellerkraut, Jeffrey Smilow and Murray Elbogen?

5 MR. SLOTNICK: I object to the form of the  
6 question as not being binding on my client.

7 THE COURT: Overruled.

8 MR. ZWEIBON: Same objection.

9 THE COURT: Overruled.

10 A Same declination.

11 THE COURT: I order you to answer.

12 THE WITNESS: Same declination.

13 MR. JAFFE: At this time the government would  
14 ask the Court, pursuant to Rule 42B, to orally notify this  
15 witness that he is to be held in criminal contempt  
16 pursuant to Rule 42B and Sections 401 and 402 of Title  
17 18, United States Code?

18 We would state to the Court that we are at this  
19 time ready to proceed forthwith with a trial for criminal  
20 contempt of the witness Richard Huss.

21 THE COURT: I want to tellyou, Mr. Huss,  
22 as I have throughout your examination this morning, that  
23 your failure to answer the questions put to you constitutes  
24 in my judgment criminal contempt.

25 However, so far as the United States Attorney

2 is concerned, because of the seriousness of this criminal  
3 contempt, I think that the United States Attorney should  
4 proceed on papers as indicated in Rule 42 B, namely,  
5 that part "or on application of the United States Attorney  
6 by an order to show cause or an order of arrest."

7 You have made the application and since you make  
8 the application I ask you to comply with Rule 42B and proceed  
9 by order to show cause or an order of arrest so that the  
10 order to show cause, to be perfectly frank with you, will  
11 specify in writing for this man what it is he is facing.  
12 Obviously this proceeding will be a jury proceeding.

13 MR. JAFFE: That is correct.

14 THE COURT: Because it is inconceivable to me  
15 that anybody would be thinking of proceeding in a manner  
16 that would limit punishment, if this man is guilty, to six  
17 months, and therefore I want every letter observed.  
18 I want him proceeded against in writing. I want the case  
19 to proceed to a jury trial and I want the Judge, whoever  
20 he is, to have in mind my views as I have expressed it  
21 and previously this morning of the seriousness with which  
22 I view the frustration of a murder prosecution. People  
23 may do that, but the law will make them pay.

24 MR. JAFFE: Your Honor, with regard to Rule 42B  
25 the government would ask that -- and we will comply with

2 your Honor's direction to proceed on papers, but the  
3 government would ask that since under Rule 42B notice can  
4 be given orally by the Judge in open court in the presence  
5 of the defendant, and he will be a defendant, being cited  
6 for criminal contempt.

7 THE COURT: I have so notified him, it seems to  
8 me, several times.

9 If he has misunderstood me I so notify him now.

10 You will be a defendant in a criminal contempt  
11 proceeding. That is clear, isn't it, Mr. Huss?

12 THE WITNESS: Yes, it is.

USA 100-475  
FILE 423-711

GOV'T

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

4A

15 J E F F R E Y S M I L O W, called as a witness in  
16 behalf of the government, was duly affirmed,  
17 and testified as follows:

6-17  
EXHIBIT  
U. S. DIST. COURT  
S. D. OF N. Y.  
93

4  
5  
6  
7  
8

THE COURT: I have read that.

Let me ask you, Mr. Smilow, are you prepared to  
answer the questions which you refused to answer at the  
last session?

THE WITNESS: No.



2 and whether or not it is tainted.

3 THE COURT: I decline to do so. I am not  
4 even going to ask him anything today other than the fact  
5 that he would persist in his refusals to answer. Beyond  
6 that I think the record is sufficient to proceed against  
7 him, as I warned him the last time, for criminal contempt,  
8 and the United States Attorney advises me that he is going  
9 to do it based on the record the last time at which you made  
10 no such request.

11 Then if you want to take it up with the trial  
12 judge, whoever it may be, in his criminal contempt case,  
13 that may be the place to do it. But for now I believe,  
14 and I advise you, sir, that your failure to answer questions  
15 which you are now looking at at the last session which you  
16 were called upon to testify constitutes criminal contempt of  
17 court and that the punishment for criminal contempt is without  
18 limit.

19 Is that clear?

20 THE WITNESS: Yes.

21 MR. LEIGHTON: Is your Honor going to allow  
22 the United States Government to ask of Mr. Smilow questions  
23 concerning this record?

24 THE COURT: No, the record is clear.

25 MR. PUTZEL: I think the record is perfectly

2 clear and I think Mr. Smilow has answered that he persists  
3 in his contemptuous refusal to answer questions and,  
4 accordingly, pursuant to Rule 42B of the federal rules  
5 of criminal procedure we will move this court through  
6 an order to show cause on papers to have Mr. Smilow  
7 cited for criminal contempt.

8 I would ask the Court to inquire of Mr. Smilow  
9 whether he was in court just previous to this during the  
10 time when Mr. Huss was advised by the Court of the con-  
11 sequences of refusal to testify.

12 THE COURT: Were you here when I dealt with Mr.  
13 Huss a few moments ago; were you in the courtroom?

14 THE WITNESS: Yes.

15 THE COURT: You heard the entire --

16 THE WITNESS: Yes.

17 THE COURT: -- situation, all the questions  
18 and everything I said to Mr. Huss?

19 THE WITNESS: Yes.

20 THE COURT: All right.

21 MR. PUTZEL: Our application is that Mr.  
22 Smilow be arrested and that bail be fixed in the amount  
23 of \$50,000.

24 THE COURT: I will hear you.

25 MR. LEIGHTON: Your Honor, on the question of



UNITED STATES OF AMERICA :

-v- :

RICHARD HUSS, :

Defendant. :

73 Cr. Misc. 24

(TPG)

73 Cr. Misc. 25

UNITED STATES OF AMERICA :

-v- :

JEFFREY H. SMILOW, :

Defendant. :

JUDGMENT AND ORDER

1. On June 27, 1973 the Hon. Arnold Bauman, United States District Judge, having previously held the defendants Richard Huss and Jeffrey H. Smilow in civil contempt of court, directed the United States Attorney for the Southern District of New York to proceed against the said defendants on the charge of criminal contempt of court for their having knowingly and wilfully refused to obey lawful orders of the Court requiring the said defendants to testify under grants of immunity at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

2. This proceeding commenced on June 28, 1973 at which time Judge Bauman signed certain orders requiring each of the said defendants to show cause why he should not be adjudged in criminal contempt of court for his wilful refusal to answer questions put to him at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

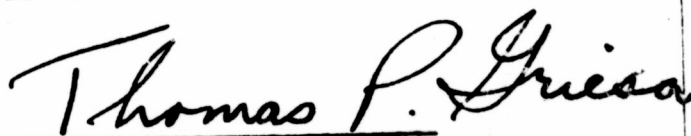
3. On July 15, 1974 the trial of this matter commenced before the Hon. Thomas P. Griesa and a jury. On July 16, 1974 the jury found the defendants Huss and Smilow guilty of criminal contempt of court;

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Richard Huss and Jeffrey Smilow be, and hereby are, remanded to the custody of the Attorney General or his duly authorized representative for a period of one (1) year, service of the said sentence to commence on August 5, 1974 at 10:00 a.m. at which time the said defendants shall surrender themselves at Room 506, United States Courthouse, Foley Square, New York, New York.

Dated: New York, New York

July 31, 1974.

IT IS SO ORDERED.

  
THOMAS P. GRIESA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x	:	
UNITED STATES OF AMERICA,	:	
-against-	:	74 Crm. Misc. 24 and 25
	:	
RICHARD HUSS and JEFFREY SMILOW.	:	<u>NOTICE OF APPEAL</u>
-----x	:	

Notice is hereby given that Richard Huss and Jeffrey Smilow, defendants above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of the District Court for the Southern District of New York convicting the defendants of criminal contempt of court and sentencing them to serve one year in prison, entered in this      on the 31st day of July, 1974.

Dated:

New York, New York  
August 2, 1974.

*Paul G. Chevigny*  
Paul G. Chevigny  
84 Fifth Avenue  
New York, New York 10011  
Attorney for Defendants



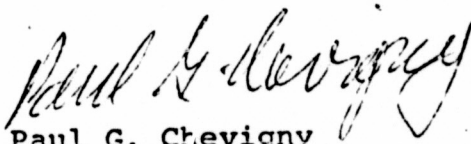
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----	-x	
UNITED STATES OF AMERICA,	:	
	:	
-against-	:	74 Crm. Misc. 24 and 25
	:	
RICHARD HUSS and JEFFREY SMILOW.	:	<u>NOTICE OF APPEAL</u>
	:	
-----	-x	

Notice is hereby given that Richard Huss and Jeffrey Smilow, defendants above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of the District Court for the Southern District of New York convicting the defendants of criminal contempt of court and sentencing them to serve one year in prison, entered in this action on the 31st day of July, 1974.

Dated:

New York, New York  
August 2<sup>nd</sup>, 1974.

  
Paul G. Chevigny  
84 Fifth Avenue  
New York, New York 10011  
  
Attorney for Defendants